Supreme Court, U.S.
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No. 02 - 6

In the

**SUPREME COURT OF THE UNITED STATES**

RESEARCH SYSTEMS CORPORATION,
*Petitioner,*

v.

IPSOS PUBLICITE, IPSOS USA and IPSOS S.A.,
*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Due Process Clause of the Fifth Amendment to the Constitution provides that "[n]o person shall . . . be deprived of life liberty or property without the due process of law". This clause has both a substantive and procedural aspect, of which only the procedural aspect is relevant to this petition. In the underlying action, the petitioner was faced with numerous discovery abuses and delays by the respondent. Instead of curing the pretrial abuses through sanctions, the Magistrate responded by establishing an aggressive discovery schedule which allowed the Respondent to disclose two weeks before trial, for the first time, its witness lists, and trial exhibits even though the same were the subject of long overdue interrogatories and requests for production of documents. The respondent then dumped 1,400 pages of new documents and produced several new witnesses. The petitioner asked for a continuance to review the information but such was denied. The petitioner claims this prejudiced it's ability to adequately prepare for trial. The Seventh Circuit held that this schedule allowing late production was not an abuse of discretion (and ostensibly did not violate Petitioners due process rights), and that this conduct by respondent was not sanctionable under Rule 37.

The questions presented are (I) whether litigants in a civil trial are afforded the same basic, due process right to prepare for trial enjoyed by criminal defendants and (II) what are the standards for imposing Rule 37 sanctions for discovery abuse and is production of substantial, material new documents and new witnesses on the eve of trial prejudicial, as the Eighth and Third Circuits have held, or not prejudicial as the Seventh Circuit appears to believe.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner research systems corporation states that it has no corporate parents, and that no publicly held company owns 10% or more of research systems corporation's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The district court's rulings (per Young, J.) regarding petitioner's many motions to compel, motions for sanctions, and motions for continuance (which make up the subject matter of this appeal) are not otherwise published. The court of appeals opinion (per Ripple, C.J.) is published at 276 F.3d 914. The court of appeals' order denying a rehearing is not otherwise published.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on January 9, 2002 and revised its opinion, but denied rehearing on March 28, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254 (1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of this petition are the Fifth Amendment of the Untied States Constitution and Rules 26 and 37 of the Federal Rules of Civil Procedure all of which are reprinted in the Appendix at 1, 2 and 9.

## STATEMENT OF THE CASE

### Plaintiff-Petitioner research systems corporation

Plaintiff-Petitioner research systems corporation ("rsc") is an Indiana corporation in the field of advertising research, with its principal place of business in Evansville, Indiana.

rsc produces a market research methodology for evaluating television commercials named ARS Persuasion®. ARS Persuasion® is a pre-post brand shift measure, meaning that the measurement tests the commercial's influence on consumer choices using responses gathered before and after exposure to a commercial. ARS Persuasion® set the standard in the field of evaluation of television commercials.

rsc considers the ARS Persuasion® methodology to be confidential, proprietary, and a trade secret. rsc has taken steps to preserve the confidential, proprietary, and trade secret status of its methodology. These steps include confidentiality agreements, electronic security, employee training, security badges, passwords, exit interviews, and visual reminders.

**Defendants-Respondent IPSOS S.A., IPSOS Publicité (n/k/a IPSOS Insight Marketing), IPSOS U.S.A., and IPSOS America**

Defendant IPSOS S.A. is a French Corporation.

Defendant IPSOS Publicité (n/k/a IPSOS Insight Marketing) is a French company that is a wholly owned subsidiary of IPSOS S.A. IPSOS Publicité is in the business of advertising and market research, including studies of the effectiveness of television commercials. Pre*Vision was the name of the IPSOS product.

IPSOS U.S.A. was formerly a wholly owned subsidiary of IPSOS S.A., formed in 1996 as a Delaware corporation, with its principal place of business in Chicago, Illinois. Defendant IPSOS America was formed in 1998 and is also a wholly owned subsidiary of IPSOS S.A. Hereinafter all the above entities will be collectively called "IPSOS".

**Factual Background**

The dispute in this case centered on the trade secrets of a small Indiana company facing a knock off of its main product by a French conglomerate entering the U.S. market, all in violation of written confidentiality agreements. IPSOS contacted rsc to arrange a meeting to discuss a potential joint venture in Europe in June 1989. IPSOS met with rsc at rsc's headquarters in Evansville, Indiana on August 31, 1989. Prior to the meeting, IPSOS and rsc signed a "Supplier Security Agreement."

Negotiations on the joint venture project began in earnest in September 1990. At that time, Patrick LeBrigand signed a Confidentiality Agreement with rsc on behalf of IPSOS. rsc provided to IPSOS confidential, proprietary and trade secret documents and information. Didier Truchot,

president of IPSOS S.A., Patrick LeBrigand, and Laurence Soubrane, met with rsc in Evansville, Indiana in December 1990. Prior to the meeting, Didier Truchot, on behalf of IPSOS S.A., and Margaret Blair, on behalf of rsc, signed a Confidentiality Agreement, dated December 12, 1990. During their stay, the IPSOS representatives were given a guided tour of the facility by rsc Executive Vice President, Sue Ernspiger. The tour included a detailed beginning-to-end description of the ARS Persuasion® methodology as it is performed on a daily basis by rsc employees.

rsc proposed a joint venture company in France in which rsc would receive various fees for licensing the ARS Methodology® to the joint venture. Importantly, rsc was pursuing similar joint ventures in the United Kingdom (with RSL) and in Germany (with Sample Institute).

Negotiations with IPSOS and the other companies began to break down in February and March 1991. Thereafter, negotiations between rsc and the three European companies ended on or about August 1, 1991. Unbeknownst to rsc, however, the three European companies had begun coordinating as early as January 1991. Around September 1991, IPSOS, RSL, and Sample introduced a "revised" PRE*VISION product. The revised PRE*VISION was strikingly similar to rsc's ARS Persuasion®. After IPSOS came to the United States, rsc filed suit against IPSOS for breach of the confidentiality agreements and misappropriation of trade secrets.

**Pretrial History**

**Repeated Requests for Defense Witness and Exhibit Discovery**

On April 10, 1998 rsc served IPSOS with its Second Request for Production of Documents. These were followed by rsc's Second Set of Interrogatories on May 15, 1998. These discovery requests sought the identification of IPSOS' expert witnesses, lay witnesses and trial exhibits, among other information.

IPSOS discovery tactics became obvious from early on in the discovery process. Due to IPSOS' failure to provide complete responses to both sets of discovery requests, rsc was forced to seek the Court's assistance to Compel IPSOS to produce the requested documents and to provide full and complete answers the Interrogatories on numerous occasions.

On July 10, 1998 and August 5, 1998, respectively, the Court granted rsc's Motions to Compel requiring that the answers be produced within 30 days of the Order relating to the Interrogatories and within 20 days of the Order relating to the Request for Production. (Attached as Appendix 15, 20)

In its July 10, 1998 Order, *id.* the Court issued the following warning:

> "The parties are herby reminded of certain basic principles found in Federal Rule of Civil Procedure 26. Rule 26(D) provides that "methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." (Order, Docket #156)

Yet, the Court's instruction fell upon deaf ears. Due to IPSOS's failure to fully comply with the Court's July 10, 1998 Order *id.* and with the understanding that IPSOS was refusing to comply with the Court's August 20, 1998 Order, rsc filed a Motion to Enforce the Magistrate Judge's July 10 and August 5, 1998 Orders in preparation for the Magistrate's hearing on August 21, 1998 to resolve outstanding discovery issues.

As a result of the various Motions relating to discovery, the Court issued an Order on December 4, 1998, (attached as Appendix 25) which denied as Moot all discovery motions. The court set up a system to allow the parties to attempt to settle their discovery disputes on their own. If the parties were unable to reach an agreement on the discovery

requests, they were required to file a packet containing all disputed discovery requests for resolution by the Magistrate on February 10, 1999. This Order indicated that this case would require a heavy-handed approach to deal with the discovery disputes.

Due to the parties' failure to come to an agreement over the disputed discovery requests, a Joint Submission of Interrogatories, Requests for Production and Requests for Admission Still in Dispute, was filed. Included in the Joint Submission were rsc's requests for IPSOS to identify its expert witnesses, lay witnesses, and exhibits it intended to present at trial.

On February 24, 1999, the Court set forth a scheduling order for the disputed discovery. (Attached as Appendix 33) IPSOS was required to produce a preliminary listing of their lay witnesses within 15 days of the Order to be supplemented in accordance with Federal Rule of Civil Procedure 26. IPSOS was also required to identify their expert witnesses and trial exhibits by September 15, 1999. Finally, IPSOS was required to produce all items specifically referenced in any answer to the Interrogatories within (15) days of the Order.

IPSOS supplemented their Discovery responses on March 11, 1999 and May 7, 1999, finally identifying only nine lay witnesses and producing an additional incomplete set of requested documents more than a year after initially requested.

Yet, reverting back to their pattern of discovery tactics, IPSOS failed to provide test data and financial information as required by the February 24, 1999 Order. *id.* As a result, rsc was forced to again file a Motion to Compel.[1]

IPSOS delay tactics were not only focused on the production of tangible evidence, but also extended to it's production of witnesses for deposition. In order to assist the controversy brewing over the production of witnesses for deposition, the Court entered an order on June 25, 1999 setting

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[1] Due to the verbal representations of IPSOS counsel during a June 25, 1999 Court Conference, indicating their willingness to produce such documents, Plaintiff withdrew their motion.

forth the dates upon which all witnesses shall be deposed. The Court referenced rsc's letter of February 9, 1999, requesting the deposition of sixteen IPSOS employees and ordered that all of the depositions be taken between August 12, 1999 and December 20, 1999. The trial date was set for three months later, April 3, 2000.

**Seven-Month Countdown to Trial: Defense Delays**

On September 8, 1999 IPSOS filed a Motion objecting to producing four of the witnesses identified for depositions in the June 25, 1999 Order. On October 20, 1999, the Court ordered that two of the contested four witnesses were to have their deposition taken per the August Order. By November 29, 1999, the Court pushed forward the third deposition with pertinent instructions regarding the fourth.

Additionally, IPSOS made no further voluntary supplement to its expert or lay witness list throughout September and October of 1999. rsc sent multiple letters requesting additional supplements from IPSOS. Each time the requests were met with negative responses.

Furthermore, IPSOS still had not produced relevant test files and financial information which IPSOS counsel had verbally indicated they would provide during the June 25, 1999 hearing. Since the data was relevant to outstanding depositions, rsc had to re-file its Motion to Enforce Magistrate's February 24, 1999.

It was against this backdrop that the Magistrate Judge created a new pretrial disclosure schedule on January 5, 2000. (Attached as Appendix 40) First, the court ordered that all test files and financial data, which the Plaintiff had requested in 1998, were to be produced by January 14, 2000. In addition, the new Scheduling Order set forth an accelerated timetable for the remaining depositions.

Moreover, it ordered a final lay witness list be provided by both parties by March 3, 2000. Finally, it

required each party to exchange all trial exhibits by March 16, 2000 and did not mention when IPSOS was required to submit their final expert witness list.

On January 12, 2000, the Court ordered IPSOS to file its final witness list and exhibit list by March 17, 2000, **only twelve days** prior to the trial date of April 3, 2000. (Attached as Appendix 49)

Within fifteen days of the Court's Order regarding the production of the long sought after financial and test documents, IPSOS filed yet another Motion to restrict its production of such documents. The Court again Ordered that the requested documents be produced to rsc. This time IPSOS was required to produce the documents by February 14, 2000. Thus, documents rsc had sought since early 1998 and which rsc had indicated over and over again were vital to relevant depositions, were to be produced less than a month and half away from the start of the trial.

**One-Month Countdown to Trial: Defense Dumps**

On March 3, 2000, IPSOS produced a preliminary list of lay witnesses, in which they identified for the first time two new witnesses: Mr. VonGonten as a fact witness, and Mr. Rosenberg. Moreover, in their final witness lists produced on March 17, 2000, IPSOS identified two new witnesses, Ms. Fraser and Mr. Northcut, neither of whom had ever been mentioned in any previous discovery response. Furthermore, IPSOS named VonGonten (previously identified as a fact witness on March 3, 2000) as an expert witness. *Id.* In conjunction with these identifications, IPSOS produced additional trial exhibits totaling approximately 1,700 pages never before provided through any discovery response. Additionally rsc had to take supplemental depositions of witnesses previously deposed due to the aforementioned late production of test data, financial data, and other documents by IPSOS.

As a result of IPSOS' actions and the Court's schedule allowing late production of critical information, rsc had to file

a litany of Motions to attempt to protect their right to engage in full discovery in order to adequately prepare for trial.

The first of these motions was a Motion for Emergency Status Conference filed on March 6, 2000, to obtain a Court order to take supplemental depositions due to the late production of documents. While this Motion was pending, it became apparent to rsc that IPSOS discovery tactics and the court's schedule made it impossible for rsc to complete all pre-trial discovery prior to the scheduled trial date of April 3, 2000.

As a result, on March 17, 2000, rsc filed a Motion for a Continuance of the Trial Date requesting sixty additional days. This would have provided the two month buffer between the completion of discovery and the beginning of the trial as intended by the Court, as evidenced in the June 25, 1999 Order. As a basis for their Motion, rsc brought to the Court's attention the following issues:

(1) the need to re-depose IPSOS principals due to the late production of discovery material;
(2) IPSOS identification of new expert witnesses;
(3) IPSOS failure to produce any expert witness reports to date,
(4) IPSOS recent production of trial exhibits, never before produced during discovery; and
(5) the current scheduling order requiring rsc's jury instructions, voir dire questions and submission of an exhibit notebook by March 24, 2000.

The Court decided on the same day as the Motion for a Continuance was filed, that it would deny such Motion. (Attached as Appendix 53) However, as a mere pittance, the Court vacated the trial date of April 3rd only to reschedule it for April 4, 2000. The Court review explained the reasons for its determination.

After the Court denied its Motion for a new trial, rsc found itself within two weeks of trial, facing new lay witnesses, new expert witnesses, new trial exhibits and the necessity to supplement previous depositions along with the

depositions of the newly discovered witnesses because of IPSOS discovery tactics and the Courts schedule.

rsc attempted once again to bring to the Court's attention the issues it faced due to IPSOS' unresponsiveness and the Court's own prejudicial schedule. In this regard, rsc filed motions directly attacking IPSOS' delay in discovery combined with the Court's unreasonably late deadlines, which resulted in the revelation of new witnesses and evidence within thirty days of the scheduled trial date.

On March 22, 2000, rsc filed a Motion to Strike VonGonten and Rosenberg, the two fact witnesses who were not initially identified until thirty days prior to trial and one of whom was identified as an expert witness within fourteen days of trial. Moreover, rsc filed a Combined Motion to Strike Defendants Trial Exhibits, which had been produced for the first time between March 16, 2000 and March 21, 2000, and equated to over 1,400 pages of documents.

On March 24, 2000 rsc filed a Motion to Strike Malcolm McNiven from IPSOS Expert Witness List. This Motion was based on the fact that IPSOS had failed to provide the expert's report, which had been requested in 1998, until March 17, 1999, three days prior to his deposition. The expert report had attached to it an appendix of articles, which had never been previously identified, that the expert was relying upon, which totaled over 1,000 pages.

rsc tried one last time to bring to the Court's attention the position it had been placed in due to the last minute production. On March 28, 2000, rsc filed its Second Motion of Continuance. While rsc utilized every available legal method to bring the prejudicial effect of this late production to the Court's attention, such efforts fell upon deaf ears. With the exception of rsc's Motion to strike VonGonten and Rosenberg, which the Court took under advisement to be determined during trial, the Court denied all of rsc's motions pertaining to the prejudicial effect of the late discovery production. Moreover, in relation to rsc's Second Motion for a Continuance, the Court only afforded rsc a two day reprieve,

thereby resetting the trial date to April 6, 2000. (Attached as Appendix 55)

**Trial and Appeal**

The trial went ahead on April 6, 2000 and the jury returned its answers to special interrogatories on April 27, 2000. The result was a verdict for the defense on all counts. (Attached as Appendix 60, 64) rsc thereafter appealed this verdict to the Seventh Circuit Court of Appeals. The Seventh Circuit ruled, with respect to rsc's due process claim, that since rsc did not claim materials were produced late according to the court's schedule and since trial courts must have leeway in managing their dockets, the court's denial of a continuance to deal with the flood of eleventh hour discovery was not an abuse of discretion. (Attached as Appendix 65, 67) With regard to sanctions, the Seventh Circuit looked only at the post January 5 & 12, 2000 Orders and held that rsc had not shown any misconduct on the part of IPSOS that would subject IPSOS to sanctions. The Seventh Circuit made no mention of the prejudicial effect on rsc of the combination of the continued discovery delays by IPSOS and the Order allowing IPSOS to make important witness and exhibit disclosures two weeks before trial. Pursuant to a Motion for Rehearing, the Seventh Circuit modified its original opinion, but did not change the outcome. (Attached as Appendix 84, 86)

**REASONS FOR GRANTING THE WRIT**

This Petition should be granted for two reasons. First, this case presents this Court with an opportunity to extend to civil litigants, the due process right to actually prepare for trial that criminal defendants enjoy via *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), such that getting one's "day in court" in a civil trial will not be rendered a hollow formalistic exercise because a real opportunity to adequately prepare was not given. The Seventh Circuit's opinion sanctions the deprivation by the District Court of the Petitioners due process right to be heard at a meaningful time and in a meaningful manner. This occurred when the District Court permitted the Respondent to continually delay and withhold discovery responses without

sanction, and then the District Court fashioned, of its own volition, an aggressive pretrial discovery schedule in order to "save" the impending trial date. This schedule was made just three months before trial and allowed the Respondent to withhold key disclosures until the weeks and days before trial. In fact some of these deadlines were extended for the Respondent. The net effect was to allow the Respondent to benefit from its own delay and dump thousands of pages of documents and numerous new witnesses on the petitioner just before trial. Such conduct substantially inhibited the Petitioner's ability to prepare its case such that its due process rights to be heard at a meaningful time and in a meaningful manner were compromised. The Court of Appeals upheld the District Court's deprivation. This failure to police the rulings of the District Court, even under an abuse of discretion standard, so offends the notions of justice and equity that this Court should exercise its supervisory power.

Second, the Court of Appeals' approval of the type of discovery abuses permitted by the District Court in this case is in conflict with other Circuit Courts regarding what is sanctionable conduct. Other Circuit Courts have held nearly identical "famine and feast" or "trial by ambush" conduct by the parties to be sanctionable. The unwitting aid and support of this conduct by the District Court is what makes this case one of due process, but in no way distinguishes this case from the fundamental holdings of other circuits, that this type "famine and feast" conduct is simply unfair to the opposing party.

Additionally, there appears to be a substantial amount of disagreement among the Circuits regarding when the ultimate sanction of dismissal should be granted for discovery abuse. This disagreement among the various Circuits regarding sanctions raises important issues regarding the proliferation of discovery abuse. Therefore, this case presents this court with an opportunity to further the goal of deterrence of such corrosive conduct by establishing a national rule for the Federal Courts to analyze and punish such abuses.

## I. The Seventh Circuit's Opinion Sanctions the District Court's Deprivation of Petitioner's right to Procedural Due Process.

The Fifth Amendment guarantees that no citizen will be deprived of life, liberty or property without the due process of law. U.S. Const. Amend. V. The hallmark of procedural due process is fairness, *see Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973), which requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Furthermore, the Due Process clause has been held to protect the twin aims of "prevention of mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted)[2]. "At the same time [Due Process] preserves both the appearance and reality of fairness 'generating the feeling, so important to a popular government that justice has been done'". *Id.* at 242 (*citing: Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)). Therefore, the Due Process clause not only serves to ensure a fair trial for the litigants but also safeguards the legitimacy of judicial proceedings in the eyes of the public since "[t]he validity and moral authority of a conclusion largely depend on the mode by which it has been reached". *Joint Anti-Fascist Committee*, 341 U.S. 171; *see also Morgan v. U.S.*, 304 U.S. 1 (1938).

What this guarantees to parties and the public is a procedurally fair trial aimed at ascertaining the truth[3] and producing a reliable verdict[4]. This guarantee of a fair and

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[2] While *Marshall* dealt with Due Process in the area of judicial bias, the two central concerns of the clause announced in that decision were not limited to only questions of judicial bias.

[3] Ascertaining the truth is also a goal of the Federal Rules of Evidence. See F.R.E. 102.

[4] See Mathews v. Eldridge, 424 U.S. 319, 344 (1976) stating that "procedural due process rules are shaped by the risk of error inherent in the truth finding process".

reliable truth finding process encompasses the right to be able to prepare for trial. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). As the Court noted in *Ungar* "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" can be a denial of due process. *See id.* Additionally, encompassed in this "right to be heard at a meaningful time and in a meaningful manner" is the due process right to have a meaningful opportunity to present evidence and cross-examine witnesses. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). While these cases deal with procedural due process in the criminal context, their aim is to prevent rights, guaranteed to all by the Fifth Amendment, from being rendered an "empty formality". *See Ungar*, 376 U.S. 589. It is clear that without some time to prepare before trial, the right to be heard, the right to present evidence and the right to cross-examine witnesses can be rendered meaningless formalities. This case presents this Court with an opportunity to expressly extend those fundamental due process rights to civil litigants as well. One's "day in court" in a civil trial will not be rendered a hollow formalistic exercise because a real opportunity to adequately prepare was not given. All of this is centered on preserving the legitimacy of the system in both the eyes of the litigants and the public.

The legitimacy of the truth finding process is called into question when a Judge orders a pretrial discovery schedule that allows the defendant to make substantial first time productions of documents, and disclose new expert and lay witnesses just two weeks before trial, even though such information had been requested by the plaintiff nearly two years before, and does not grant a reasonable continuance to deal with the deluge of new material. This is especially true when the discovery schedule allows such production on the eve of trial by the defendant to the plaintiff, the party with the burden of persuasion. Dumping volumes of documents in the hours before trial has been held to be sanctionable conduct in

other circuits[5] when perpetrated by the parties because of the prejudice that results. Why should the same conduct be tolerated when it comes via Court Order? Litigants in a civil trial must be given the ability to prepare for trial in order for that trial to be meaningful and for the judicial process to inspire that feeling that justice has been done. Without this requirement, discovery abuse will be rewarded since late production will significantly reduce or completely eliminate the opposing side's preparation. The result will be a trial that is unreliable and unfair since only one side has had the benefit of adequate preparation. As a result, the possibility of error in the truth finding process will be greatly increased since the fundamental prerequisite of a "level playing field" has been shifted in favor of the party who is not burdened by substantial eleventh hour production. The contest will then become one of who can hold out on discovery requests the longest and then bury the other side in documents and distract their opponents with late depositions so that the other side is given as little time as possible to prepare its case. This does not ensure a more accurate truth finding process nor does it further the feeling of fairness to the litigants or the appearance of fairness to the public.

Allowing Judges, in a civil case, to set discovery schedules and move deadlines for one party, which allows that party to make the bulk of its production in the weeks before trial, but make no corresponding shifts of the trial date to allow the burdened party to make any effective use of the produced discovery, denies a procedurally fair trial. In essence, it forces the party who receives the late production just before trial to make a Hobson's choice between reviewing the material produced in order to make use of it at trial, or preparing for trial with the material already known. Forcing this election upon a party is a denial of due process and this Court should use this opportunity to combat discovery abuse

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[5] *See Baker v. General Motors Corp.*, 159 F.R.D. 519, 526-528 (W.D. Mo., 1994) (only level of sanction overturned by 86 F.3d 811 (C.A. 8, 1996)); *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 721 (C.A. 3, 1997).

and delineate the bounds of procedural due process, as it relates to the ability to prepare for trial.

Creating a time period before trial which cannot be invaded by those who abuse discovery to gain an advantage will not only curb abuse, but will also give district courts a clear rule to insure that the process eventually afforded offers a meaningful and reliable adjudication.

## II. Discovery Abuse is an Epidemic That Threatens The Legitimacy of Our System of Justice and Clear Standards for Curbing Such Abuse Need to be Delineated by This Court to Rectify the Confusion Between the Circuits.

"[M]odern instruments of discovery . . . together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent". *U.S. v. Procter and Gamble*, 356 U.S. 677, 682 (1958). Despite this statement of the importance of full and fair discovery, many cases today are decided not on the facts, but by which side can hide documents or delay the longest. As one author has noted "[u]nfortunately, plaintiffs' efforts to discover relevant documents and information are often met with delay and obstruction. Stonewalling and other forms of discovery abuse are endemic in large, complex cases". Paul j. Komyatte, *Hitting the Wall in the Discovery Race*, Trial Magazine, p.24 (March 2002). The way that courts can most effectively combat these abuses is through the use of sanctions. However, the quagmire of confusion over what circumstances warrant sanctions between and among the Circuits has actually served to encourage abuse. This is because the substantial amount of gray area and selective enforcement have created a climate where those who abuse discovery are willing to take the chance that they either will not get punished, or, if they are caught, will not be punished that severely. This case presents an opportunity for this Court to clear up the confusion and take a stand against discovery abuse through Rule 37.

This Court first announced its position on Rule 37 sanctions in *National Hockey League v. Metropolitan Hockey Club Inc.*, 427 U.S. 639 (1976). There, this Court stated that the goals of Rule 37 were to not only penalize wrongdoers, but to also deter others from engaging in like conduct. *See id.* at 643. In a more recent Rule 37 case, Justice Kennedy, in his concurring opinion, explained why the imposition of sanctions is such an important topic for this Court to address by noting that "cases involving sanctions against attorneys all too often implicate allegations that, when true, bring the law into great disrepute. Delays and abuses in discovery are the source of widespread injustice". *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999). Despite this sobering statement from Justice Kennedy, it is well documented that the "Rambo" tactics by those who view litigation as warfare have become an increasing problem, prompting one author to proclaim that "discovery abuse is alive and well". Joel Slawotsky, *Rule 37 Discovery Sanctions- The Need For Supreme Court Ordered National Uniformity*, 104 Dick. L. Rev. 471, 472 (Spring, 2000); see also Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuits Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D. L. Rev. 36, 43 (1998); Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. Rev. 199 (1994); Byron C. Kelling, *A Prescription for Healing the Crisis in Professionalism: Shift the Burden of Enforcing Professional Standards of Conduct*, 25 Texas Tech L. Rev. 31 (1993). As the following will show, discovery abuse has reached such epidemic proportions because of vast disagreement among the Circuits as to what factors to consider when imposing sanctions. Furthermore, the decision of the Seventh Circuit to affirm the district court's scheduling order and to affirm the ruling on Petitioner's motion for sanctions, in combination, directly conflicts with the rulings of two other Circuits on almost identical facts.

**A. Without Objective Criteria From this Court as to what is Sanctionable Conduct, Haphazard and**

**Selective Sanctioning have Eviscerated Rule 37 of its Deterrent Purpose.**

As noted above, discovery abuse is an ongoing and increasing problem in litigation. One of the biggest and best weapons against such abuse is the trial court's ability to impose a default or dismissal as a sanction.[6] See Joel Slawotsky, *Rule 37 Discovery Sanctions- The Need For Supreme Court Ordered National Uniformity*, 104 Dick. L. Rev. 471, 472 (Spring, 2000); see also Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuits Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D. L. Rev. 36, 43 (1998). This sanction is only a deterrent if parties know under what circumstances the courts will use it. See

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[6] While the petitioner did not seek a dismissal or default against IPSOS, it did seek to have IPSOS sanctioned and before trial the petitioner did seek to have IPSOS' production in the last weeks before trial stricken as a sanction, including all of IPSOS' trial exhibits which would have hindered IPSOS in a similar way as a default or dismissal. It should also not be lost on this court that the only reason IPSOS' "delay and dump" tactics are any different than the types of activities found worthy of default or dismissal was the fact that the district court felt compelled to reward IPSOS for its delayed disclosure by giving IPSOS until two weeks before trial to make substantial disclosures. The history of discovery between the parties clearly showed that IPSOS was unwillingly to be forthcoming with discovery responses. The parties had fought for months over the production of financial documents and test file information in connection with Petitioner's misappropriation of trade secrets claim. The result was multiple motions to compel and multiple orders from the court requiring IPSOS to produce the documents. All were met with complete resistance by IPSOS. Finally, IPSOS' recalcitrance and lack of cooperation "threatened" the April 2000, trial date. It was against that backdrop that the "Emergency" Status Conference was held. It was after this conference that the Magistrate instituted a discovery schedule that permitted IPSOS to wait until the month before trial to finally make key disclosures. Then, a few weeks later, the Magistrate moved IPSOS' deadline ahead two weeks, allowing IPSOS to wait until fourteen days before trial to make its disclosures. Considering how obstreperous IPSOS had been during the entire discovery process to date, the court had no reason to believe IPSOS would not wait until the very last day to finally give the Petitioner the information it had sought for nearly two years. Which is exactly what IPSOS did.

Slawotsky at 501. However, the Courts cannot agree on when and how this sanction should be used when the discovery process is abused. The First, Second, Seventh, Eighth[7], and Eleventh Circuits have yet to define a specific test for when their district courts should impose a sanction like default or dismissal. See Slawotsky at 490-491. The Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits have all come up with their own tests for when these sanctions should be imposed. See id. at 491. In the following Excerpt, Slawotsky shows how each Circuit has developed it own rules for imposing sanctions like default or dismissal.

> A. First Circuit
> "The First Circuit is particularly reluctant to deny parties the right to have the case resolved on the merits. Pursuant to *Velasquez-Rivera v. Sea- Land Services, Inc.*, 920 F.2d 1072 (1990), litigation-ending sanctions are "counter to its strong policy favoring the disposition of cases on their merits. . .[such that] fairness requires that some limits be placed on [the use of dismissal or default as a sanction]." *See id.*

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[7] According to the court in *Baker v. General Motors Corp.*, 86 F.3d 811 (C.A. 8, 1996) noted that the imposition of sanctions requires the satisfaction of three factors: (1) a court order compelling discovery; (2) a violation of that order which is willful; and (3) prejudice to the other party from the violation. The court also noted that, although the standard of review is abuse of discretion, it would review the imposition of sanctions to determine if the sanction is just, and specifically related to the claim at issue in the discovery order. *See id.* at 816-817. This last requirement appears to take the review of sanctions for default or dismissal out of the realm of abuse of discretion and seems to establish a more de novo type of review. See Bough at 49. In this case the court held that the sanction imposed by the district court was too severe, though the conduct of the defendant was worthy of sanction. *See Baker*, 86 F.3d at 817.

at 1075-1076. Some factors to be weighed include any history of misconduct, prejudice to the movant, willfulness, and whether the client or counsel is at fault. *See id.* at 1076. Moreover, while the First Circuit has indicated that it will be deferential in its review of sanctions decisions, that deference should not be taken as "automatic acquiescence." *U.S. v. One 1987 BMW 325*, 985 F.2d 655, 657 (1993).

B. Second Circuit

At least one district court in the Second Circuit has utilized the following factors in determining the appropriateness of litigation-ending sanctions: (1) willfulness or bad faith; (2) the history of noncompliance; (3) the efficacy of lesser sanctions; (4) whether the offender had been placed on notice of possible dismissal; (5) the client's complicity; (6) prejudice to the adversary; and (7) the competing interests of the court's docket control and the preference for resolving issues on the merits. *See American Cash Card v. AT&T, Corp.*, 184 F.R.D. 521, 524 (S.D.N.Y. 1999). Yet another court narrowed the factors stating that sanctions should (1) insure a party does not benefit from failure to comply, (2) deter

further conduct by that party in a particular case, and (3) deter others in that case and in other cases. *New York Funeral Chapels Inc. v. Globe Indemnity Co.*, 33 F. Supp 2d 294 (S.D.N.Y. 1999). However there is no one particular test.

C. Third Circuit

The Third Circuit has adopted the following six part test, which involves consideration of the: (1) extent of client's personal conduct; (2) prejudice to opposing counsel of the noncompliance; (3) past conduct; (4) willfulness; (5) efficacy of lesser sanctions; and (6) merits of the claim. *Harris v. City of Philadelphia*, 47 F. 3d 1311, 1330 n.18 (1995).

D. Fourth Circuit

The Fourth Circuit employs consideration of the following factors: (1) presence of bad faith; (2) the prejudice to the adversary; (3) the need to deter the particular conduct involved; and (4) the effectiveness of lesser sanctions. *See Mutual Federal Savings and Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 92 (1989).

E. Fifth Circuit

According to the Fifth Circuit, the

following four part test applies: (1) willfulness (or history of dilatory conduct); (2) client or counsel misconduct; (3) prejudice to opposing party; and (4) effectiveness of lesser sanctions. *F.D.I.C. v. Conner*, 20 F.3d 1376, 1380-1381 (1994)

F. Sixth Circuit

Pursuant to Sixth Circuit precedent, the following factors determine whether ultimate sanctions are warranted: (1) prejudice; (2) whether the noncompliant was warned of the potential for dismissal or default; and (3) the efficacy of lesser sanctions. *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546, 552 (1994). However, in *Bass v. Jostens, Inc.*, 71 F.3d 237 (1995), the court found the following factors relevant in ascertaining whether dismissal was a proper sanction: (1) bad faith or willfulness; (2) the degree of prejudice to opposing party; (3) whether the party was warned; and (4) the efficacy of less drastic sanctions. *See id.* at 241. The Sixth Circuit found in *Freeland v. Amigo*, 103 F.3d 1271 (1997), that the trial court abused its discretion in precluding expert testimony, which resulted in dismissal of plaintiff's complaint.

*See id.* at 1281. The appellate court found that the trial court's lack of notice to the parties that noncompliance with the pre-trial order would result in preclusion, coupled with the lack of prejudice to the defendant, mandated a reversal of the dismissal. *See id.* at 1277-1281.

G. Seventh Circuit

The Seventh Circuit has affirmed numerous litigation-ending sanction rulings. *See Halas v. Consumer Services Inc.*, 16 F.3d 161 (1994). However, the Seventh Circuit also insists on a court's delineation of the reasons for imposing sanctions and will remand a dismissal sanction based upon the district court's failure to explain the rationale for its ruling. *Matter of Scheri*, 51 F.3d 71, 75 (1995). While misconduct will be sanctioned, some misconduct will not rise to a level warranting sanction. In *Stafford v. Mesnik*, 63 F.3d 1445 (1995) the court ruled a party's absence from a single meeting did not justify entering a default judgment. The court held that the failure to attend the meeting did not constitute the "degree of egregiousness" necessary for the litigation-ending sanction imposition. *See id.*

H. Eighth Circuit

In *Baker v. General Motors Corp.*, 86 F.3d 811 (1996) the Eighth Circuit stated that prior to imposing sanctions, there must be a willful violation of a court order and prejudice arising from the violation so that the sanction be "just." Also, in *Meints v. DeWitt*, 68 F.3d 478 (1995) the court affirmed dismissal against a pro se plaintiff who was warned about the potential for sanctions for the willful failure to attend a deposition. *See id.*

I. Ninth Circuit

The Ninth Circuit employs a five-part test involving consideration of the following: (1) interest in expeditious resolution; (2) need to manage the court docket; (3) interest of resolution on merits; (4) prejudice; and (5) availability of lesser sanctions. *See Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948. In the case of *In re Exxon Valdez*, 102 F.3d 429, 432-433 (1996) the Ninth Circuit stated that the following factors are considered in reviewing a trial court's dismissal sanction: (1) public interest in prompt resolution; (2) court interest in docket management; (3) prejudice to the party; (4) public interest in

having cases decided on merits; and (5) appropriateness of lesser sanctions. However, as a practical matter, courts routinely require that the offending party acted willfully or in bad faith before terminating a case. *See George v. City of Morro Bay*, 185 F.3d 866 (1999).

J. Tenth Circuit

In *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (1995) the Tenth Circuit stated that in evaluating whether to dismiss, the district court ought to consider (1) the degree of actual prejudice to the adversary, (2) the interference with the judicial process, (3) the culpability of the offending party, (4) whether the party was warned, and (5) the appropriateness of lesser sanctions.

K. Eleventh Circuit

In *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (1993) the Eleventh Circuit articulated three factors that district courts may consider in evaluating litigation-ending sanctions: (1) while district courts have discretion, severe sanctions require willfulness or bad faith; (2) the sanction must satisfy due process considerations by being "just; and

> (3) severe sanctions must be weighed against invoking less severe sanctions."

As is apparent from these cases, the Circuit Courts are in disagreement over what circumstances are required before a district court may impose a sanction like default or dismissal. In addition, these tests are highly subjective and do very little to give guidance to the district courts and have yielded wildly different results between the circuits. Compare *American Cash Card Corp., v. AT&T Corp.*, 184 F.R.D. 521, 524 (S.D.N.Y. 1999) (finding that gross negligence can support the imposition of severe sanctions); *M & C Corp., v. Behr & Co.*, 34 F. Supp.2d 543, 548-549 (E.D. Mich. 1999) (giving the party another chance even though conduct was repeated, continuous and deplorable). As a result, the tension between managing dockets, punishing and deterring discovery abuses, and giving parties their right to be heard has created differing opinions among the Circuits with regards to what conduct is enough to warrant sanctions. See Slowatsky at 500.

To resolve this conflict, this Court should order some objective criteria for when the imposition of sanctions for discovery abuse is proper. If the Bench and Bar have a more clear and uniform set of rules to tell them when their conduct crosses the line into sanctionable discovery abuse, there will be less gray area to tempt the unscrupulous into chancing the ire of the court. It is the substantial inconsistency amongst the Circuits that gives the would-be wrongdoer hope that he will not be punished and makes the benefits of hopelessly miring one's opponent in a morass of eleventh hour production worth the risk that one **could** be punished. See Susan A. Yager, *Discovery Abuse: Have the 1983 Amendments to the Federal Rule Curbed the Problem?*, 37 Fedn. Ins. & Corp. Couns. Q. 399, 416 (1987). Consistent application of clearer, uniform rules will substantially eradicate this temptation to abuse, since the risk of getting caught and actually punished will increase and the goals of deterrence espoused in *National Hockey League v. Metropolitan Hockey Club Inc.*, 427 U.S.

639 (1976) will finally be served. Therefore this Court should grant Certiorari in this case in order to institute a uniform and objective set of criteria and resolve the conflict among the Circuits.

**B. The Seventh Circuit's Decision that the District Court Did Not Abuse Its Discretion Conflicts With the Rulings of the Eighth Circuit and Third Circuit, Which Would Have Found Identical Conduct Prejudicial to the Petitioner.**

The decision of the Seventh Circuit to affirm the district court's scheduling order and to affirm the ruling on Petitioner's motion for sanctions, in combination, directly conflicts with the rulings of two other Circuits on almost identical facts. As noted above, IPSOS' practice of delay and refusal to obey court orders necessitated the "emergency" status conference. After that conference, the Magistrate imposed an aggressive discovery and disclosure schedule with full knowledge of the fact that IPSOS had been obstructing discovery at every turn and had not produced evidence sought through discovery, even after being ordered to produce such. This schedule originally allowed IPSOS to make substantial pretrial disclosures, like its trial exhibits, witness list, and expert witness reports just one month before trial. However, the Magistrate then created a second order which gave IPSOS until two weeks before trial. The Seventh Circuit found nothing wrong with IPSOS' conduct because the eventual disclosures were "timely" and found nothing wrong with the Magistrate's schedule because of the need for courts to have leeway in establishing there own schedule. *See Research Systems Corporation v. IPSOS Publicite*, 276 F.3d 914, 920 (2002) (Attached as APX 67). The decision that forcing the Petitioner to prepare for trial under these circumstances was not at least prejudicial, if not sanctionable, is in direct conflict with the United State Court of Appeals for the Eighth Circuit and the Third Circuit.

In *Baker v. General Motors Corp.*, 159 F.R.D. 519 (W.D. Mo. 1994) the court was confronted with General

Motors' ("GM") delay in responding to discovery requests. *See id.* at 521-524. After numerous requests and motions GM finally delivered the contested items to the Plaintiffs, but only after the Plaintiffs were fortunate to discover (from another source) that the documents GM said it did not have, in fact existed. *See id.* at 522. GM finally produced the disputed documents in two boxes, containing over 441 documents, just two days before trial. *See id.* 522-523. The Court, obviously frustrated with GM's conduct[8], stated:

> this Court will not permit the biggest best-funded party to win solely because they can hold out the longest. It is clear by the proceedings reflected in the entire record of this case that this Court's warning was not heeded. General Motors clearly believed that it should do all in its power to wear the plaintiffs out through a litigation strategy of **feast and famine**. Plaintiffs were forced to **starve on incomplete discovery responses** during the **early part of the case**, and then **feast on thousands of documents** on the

[8] "This judge has been practicing law for forty-one years and has witnessed great changes from the ways giant corporations used to take advantage of the Court, the system, and the parties on the other side of discovery. It was a different ball game in those days. However, this judge has spent a considerable portion of the last five years serving as a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States. The principal work of that committee during these years was to take serious steps towards making litigation quick, less onerous and less expensive for the parties and more reflective of the underlying truth that there is in the scenario represented by the facts. GM's conduct in this case represents a clash of the ways of the past with the rules of the present. Unfortunately for the defendant, the rules of the present have the force of law on their side." *Id.* at 525-526.

> **eve of trial**. Although it is a strategy that may well assure a defense victory if permitted to go unchecked, this Court will not allow such tactics to tip the scales of justice.

*Id.* at 526 (emphasis added). The district court then stated that this conduct had prejudiced the plaintiffs' ability to prepare for trial stating:

> At a time when trial lawyers should be rehearsing opening statements, preparing witnesses and finishing jury instructions and motions in limine, plaintiffs' counsel were required to pour through reams of delinquent documents. Plaintiffs were prevented from preparing for trial in general and in particular, from solidifying their evidence on the issue of liability. The prejudice in this is complete and obvious.

*Id.* at 527. The district court then deemed that, because of GM's conduct, the issue of liability would be deemed established. *See id.* at 527-528. Though the Court of Appeals reversed this ruling, it was the severity of the sanction, not the fact that the conduct was sanctionable which troubled the court of appeals and GM was still sanctioned. *See Baker v. General Motors Corp.*, 86 F.3d 811 (1996). What is clear from *Baker* is that production of such vast amounts of information, right before trial, prejudices the ability of the party receiving the information to adequately prepare for trial.

This very same principle was recognized by the Third Circuit in *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 721 ( C.A. 3, 1997). There the court stated that "we are satisfied that Westvaco was prejudiced [when] plaintiffs' trial counsel did not advise Westvaco that he intended to call Dr.

Jemail until approximately three weeks before the scheduled trial date." *Id.* at 719. The court then stated;

> [w]e are unmoved by Konstantopoulos's argument that Wetsvaco could have "cured" the prejudice resulting from trial counsel's late designation of Dr. Jemail as an expert witness. The thrust of Konstantopoulos's argument is that Westvaco, by means of sufficient last minute scrambling, could have managed to prepare to meet Dr. Jemail's testimony at trial. Even if this is true, however, Konstantopoulos would have gained a valuable tactical advantage by requiring Westvaco to focus its litigation resources on these efforts in the last days before trial.

*Id.* at 721. Thus, the Third Circuit joins in the view held by the Eighth Circuit that first time production of or disclosure of evidence (even when it is just one expert witness) three weeks before trial, is prejudicial to the party receiving the evidence.

The case at bar has nearly identical issues as *Baker*, and *Konstantopoulos*. Petitioners contend that the production of new expert witnesses, new lay witnesses and over 1,400 pages of never before produced documents in the last two weeks before trial prejudiced Petitioner's ability to prepare for trial. The only difference between the case at bar and the two cases discussed above is that it was solely the other party's delay which caused the late production. However, there is absolutely no justification for concluding that the prejudice to the receiving party is any less destructive when the prejudice results form a combination of a parties delay, despite court orders, and the courts creation of a discovery schedule which allows such last minute production. If it was prejudicial to

receive thousands of pages of new documents just before trial in *Baker*, and it was prejudicial to receive disclosure of a new expert witness three weeks before trial in *Konstantopoulos*, then it was prejudicial for the Petitioner to receive thousands of pages of documents and several new witnesses just two weeks before trial in this case. However, the Seventh Circuit found no abuse of discretion on the part of the district court, when the district court failed to grant a meaningful continuance to allow the Petitioner to review the new material and prepare for trial. *See Research Systems Corporation v. IPSOS Publicite*, 276 F.3d 914, 919-920 (2002) (Attached as APX 67). This decision is in direct conflict with the rule in both the Eighth Circuit and Third Circuit, which would consider such late production prejudicial to the recipient's ability to prepare for trial.

This Court has the opportunity through this case to resolve this conflict and set an objective standard for uniform application. Such a standard would allow a party receiving late production of substantial amounts of discovery time to adequately review the documents and still prepare for trial and would eliminate the choice one is forced to make in the Seventh Circuit, between reviewing the newly produced material **or** preparing for trial.

## CONCLUSION

This Court should grant this petition for a writ of certiorari for all the above reasons.

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# APPENDIX

# APPENDIX A

## THE UNITED STATES CONSTITUTION
## BILL OF RIGHTS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# APPENDIX B

# FEDERAL RULES OF CIVIL PROCEDURE

**Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

**(a) Required Disclosures; Methods to Discover Additional Matter.**

**(1) Initial Disclosures.**

Except in categories of proceedings specified in rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing arty may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such

computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;
(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;
(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;
(iv) an action to enforce or quash an administrative summons or subpoena;
(v) an action by the United States to recover benefit payments;
(vi) an action by the United States to collect on a student loan guaranteed by the United States;
(vii) a proceeding ancillary to proceedings in other courts; and
(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures with 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonable available to

it and is not excused from making its disclosures because it has not fully competed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

**(2) Disclosure of Expert Testimony.**

(A) In addition tot he disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to the expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

**(3) Pretrial Disclosures.**

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under rule 32(a) of the deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

**(4) Form of Disclosures; Filing.**

Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

**(5) Methods to Discover Additional Matter.**

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

**(b) Discovery Scope and Limits.**

Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

**(1) In General.**

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

**(2) Limitations.**

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency

or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

**(3) Trial Preparation: Materials.**

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by r for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning that action or its

subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

# APPENDIX C

## FEDERAL RULES OF CIVIL PROCEDURE

**Rule 37. Failure to Make or Cooperate in Discovery Sanctions**

**(a) Motion for Order Compelling Disclosure or Discovery.**

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

**(1) Appropriate Court.**

An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

**(2) Motion.**

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under

Rule 34, fails to respond that inspection will be permitted as requested for fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

**(3) Evasive or Incomplete Disclosure, Answer, or Response.**

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

**(4) Expenses and Sanctions.**

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay the party or deponent

who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure to comply with order.**

**(1) Sanctions by Court in District Where Deposition is Taken.**

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

**(2) Sanctions by Court in Which Action is Pending.**

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, of if a party fails to obey an order entered under Rule 26(f), the court i which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designed matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.**

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may

impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.**

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the

movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

# APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

## ORDER GRANDTING PLAINTIFF rsc's COMBINED MOTION FOR LEAVE TO RE-SERVE DEFENDANTS WITH ADDITIONAL INTERROGATORIES AND TO COMPEL DEFENDANTS TO ANSWER PLAINTIFF'S SECOND SET OF INTERROGATORIES

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on the Plaintiff rsc's Combined Motion for Leave to Re-Serve Defendants IPSOS SA, IPSOS USA, and IPSOS Marketing Systemes with Forty-Five

Interrogatories, with Subparts, and to Compel Defendants to Answer Plaintiff's Second Set of Interrogatories filed June 25, 1998.

The Magistrate Judge, being duly advised, now **GRANTS** the motion.

The Magistrate Judge concludes that this litigation between direct competitors, involving sophisticated business concepts of intellectual property and confidential information, and which is international in scope, constitutes complex litigation. Under these circumstances, and in an attempt to reduce the need for more expensive deposition discovery, the Magistrate Judge believes it is prudent to allow additional interrogatories to be filed. The interrogatories filed by rsc do not appear to be directed at information which is not relevant to the lawsuit or used for other improper purposes. Therefore, rsc is **GRANTED** leave to re-serve the additional interrogatories.

The motion to compel the defendants to answer the second set of interrogatories is also **GRANTED**. The parties are hereby reminded of certain basic principles found in Federal Rule of

Civil Procedure 26. Rule 26(d) provides that "methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." Under Federal Rule of Civil Procedure 33(b)(3), answers or objections to interrogatories shall be filed within 30 days after the service of interrogatories. Under Federal Rule of Civil Procedure 26(e), a party who has responded to a request for discovery is under a duty to supplement or correct the response if information thereafter is acquired which leads the party who made the response to believe that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during discovery.

Pragmatically implementing these principles, it has been the Magistrate Judge's practice to require that all parties respond to interrogatories within 30 days, even though discovery has not been completed. The party responding is required to provide the information known to that party as a result of preliminary

discovery, and as a result of the plaintiff's Federal Rule of Civil Procedure 11 pre-filing investigation, or with such information as an initial inquiry into the defense of the lawsuit has been performed by defense counsel. By having this initial information presented in the answers, the parties can then structure the remaining discovery with the help of what information is known. Particularly in complex cases such as this, preliminary definition of the issues and parties with knowledge concerning the issues can help both parties to streamline their efforts at resolving the dispute. Under the rule, the initial responses may be supplemented when additional information is made known during the course of discovery. Because under Federal Rule of Civil Procedure 33(c) answers to interrogatories may be used at trial in certain circumstances, the Magistrate Judge has consistently allowed any party to file a supplemental final answer to any interrogatory in advance of trial. The final supplemented answer should therefore be a complete answer at the conclusion of discovery and before the trial of the case.

Therefore, the defendants are advised in this particular case that the answers which they shall file within 30 day of the date of this ruling shall be to all interrogatories, including interrogatories which seek contentions. The Magistrate Judge will allow final supplemented answers to be made within 15 days after the completion of discovery.

**SO ORDERED** this 10th day of July, 1998.

/s/William G. Hussmann, Jr.
William G. Hussmann, Jr.,
Magistrate Judge
United States District Court
Southern District of Indiana

cc: Counsel of Record

# APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

**ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFF rsc's MOTION TO COMPEL**

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on Plaintiff rsc's Motion to Compel Defendants IPSOS SA, IPSOS USA, and IPSOS Marketing Systemes to Produce Documents and Memorandum in Support (Docket Items 114, 115) filed May 22, 1998. Plaintiff rsc's Supplement to Its Memorandum in Support was filed June

2, 1998 (Docket Item 118), and an Appendix was filed June 10, 1998 (Docket Item 127). The defendants filed their Brief in Opposition on June 25, 1998 (Docket Item 137) and a Request for Oral Argument on June 26, 1998 (Docket Item 140). Plaintiff rsc filed a Reply Brief on July 20, 1998 (Docket Item 163).

The Magistrate Judge, being duly advised, now **GRANTS, in part,** and **DENIES, in part,** the plaintiff's Motion to Compel.

Prior to making specific rulings, certain observations can be made in an attempt to advise the parties why the rulings which follow were made. First, all of defendants' objections that the plaintiff has not provided its own similar documents are **OVERRULED**. Likewise, all objections raised that matters are not relevant because certain claims are time barred are **OVERRULED.**

It should be noted that many of the plaintiff's discovery requests are extremely broad, seeking, for example, "all correspondence" over periods of time as much as ten years. That being said, it is important to note that in those instances in which the defendants represent to the Court in their objections that no

such documents exist, those same defendants must be advised that the production at trial of a particularly significant document which has not been produced in discovery will not be allowed when a good faith reading of the interrogatory would find the document offered at trial to be within the confines of a particular discovery request.

These observations being made, the following **ORDERS** are entered:

1. The plaintiff's Motion to Compel is **GRANTED** as to the following Requests for Production directed to IPSOS SA:

- No. 4
- No. 5
- No. 11 (as to Metrica IPSOS)
- No. 12 (limited to documents which pertain to PRE*VISION only)
- No. 13
- No. 14
- No. 30 (limited to the financial statements which show sources of income; defendant may redact expenditure information from the financial statement)
- No. 32
- No. 35
- No. 36 (invoices may be redacted to delete the amounts charged for services other than PRE*VISION services)

2. The plaintiff's Motion to Compel is **GRANTED** with respect to Requests for Production directed to IPSOS USA as follows:

- No. 15
- No. 18
- No. 22 (limited to financial statements showing sources of income; defendant may redact expenditure information from the financial statements)
- No. 24
- No. 25 (documents must include any documents in which IPSOS USA markets PRE*VISION as a part of a joint venture, partnership, or in connection with any other entity)
- No. 26 (invoices may be redacted to delete the amounts for services charged other than PRE*VISION)

3. The items to be produced shall be produced within twenty (20) days of the date of this order.

4. In all other respects, the plaintiff's Motion to Compel is **DENIED.**

5. The defendants' Request for Oral Argument is **DENIED.**

**SO ORDERED** this 5th day of August, 1998

/s/William G. Hussmann, Jr.
William G. Hussmann, Jr.,
Magistrate Judge
United States District Court
Southern District of Indiana

cc: Counsel of Record

# APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

**ORDER ON PENDING NON-DISPOSITIVE MOTIONS**

This matter is before the court on a plethora of motions having to do with discovery matters in this case. There are motions to compel, motions to enforce or reconsider the Magistrate Judge's orders and motions for protective orders. These motions were taken under advisement when the parties came tantalizingly close to settling the matter before the court.

However, settlement was not reached, and the passage of time renders prior discovery deadlines unrealistic. In light of the need for a new scheduling order, and in consideration of the issues raised by those motions which are addressed herein, the court **DENIES, as moot,** all of the discovery motions in this case now pending before the court.

The following orders shall govern the course of discovery from this point forward:

**I. Interrogatories and Requests for Production.**

1. By not later than thirty (30) days from the date of this order, each party shall serve upon each other party a list of each interrogatory or request for production which the proponent alleges has not been properly responded to by the party designated to respond to the interrogatory or request.

2. By not later than forty-five (45) days from the date of this order, counsel shall meet and confer to attempt to resolve their disputes as required under Southern District of Indiana Local Rule 37.1. The parties may conduct the conference contemplated by that rule in person or by telephone, but the

requirements of that rule will not be met simply by an exchange of letters of faxed documents. The parties shall discuss initially whether a protective order limiting production of certain documents for counsel's inspection only may be an effective measure to allow the production of commercially sensitive information.

3. After completion of the S.D. Ind. L.R. 37.1 conference, if there are interrogatories or requests for production that the parties have not been able to reach agreement upon, the parties shall prepare and file with the court within ten (10) days thereafter a packet containing all interrogatories and requests upon which agreement has not been reached. The packet shall contain a single page for each interrogatory or request in dispute. The page shall contain a verbatim statement of the interrogatory / request, the verbatim response or objection, and a brief statement by the proponent explaining why the answer is inadequate or incomplete or why the objection is not well taken.

4. Magistrate Judge William G. Hussmann, Jr., shall resolve all disputes upon these interrogatories or requests at a

**HEARING** set on **WEDNESDAY, FEBRUARY 10, 1999**, at 9:00 a.m., Evansville time (CST), in Room 328, Federal Building, Evansville, Indiana.

5. Any additional items ordered produced or answers ordered supplemented by the Magistrate Judge shall be served within fifteen (15) days of the date of the Magistrate Judge's order on the hearing described above. As a result of the procedures described above, the parties will be well advised of their opponent's position with respect to the information requested of them in the event of an adverse ruling, and should begin preparation of their materials responsive to their opponent's request for production well before the hearing before the Magistrate Judge. The court will not consider motions to extend time to produce these items based upon a party's representation that the ruling was not anticipated and production was not begun until the Magistrate Judge's order was received.

6. While it is impossible to require that every shred of relevant paper be produced prior to any deposition being taken in this case, it is the court's intention that paper discovery be

substantially complete before depositions (which may be very expensive in this case) are begun.

**II. Depositions**

1. Depositions may be commenced in this case not earlier that thirty (30) days following the hearing before the Magistrate Judge described above. Depositions before that time must be of an emergency nature and require leave of court upon motion for good cause shown.

2. Depositions of defendants' employees who are not domiciled within the United States shall be conducted in London, England, unless the parties, *by agreement*, determine that the depositions can be taken in a different location.

3. Depositions of all witnesses shall be completed within one hundred twenty (120) days of the date that the first deposition is commenced. (This deadline does not include emergency depositions.)

**III. Dispositive Motions**

1. Plaintiff shall file a *preliminary* response to the currently pending defendants' motion for partial summary

judgment which shall be filed not later than twenty (20) days from the date of this order. That preliminary response shall address the legal standards which plaintiff believes apply to the statute of limitations defense raised by the defendants. The preliminary response shall explicitly state which of those legal issues in the plaintiff's response require discovery, and what particular interrogatory or request for production previously served addresses that legal issue. The Magistrate Judge will consider this preliminary response at the conference held on February 10, 1999, and determine whether further discovery will be allowed, and depending upon what further discovery is allowed, when the plaintiff's final response to the pending motion for summary judgment shall be served.

2. Any other dispostive motions shall be filed within forty-five (45) days after the last date of discovery depositions may be taken under this order.

**IV. Trial Date**

The Magistrate Judge shall conduct such status conferences as he deems advisable to establish a trial date as soon as the parameters of any further dispositive motions become clear.

**SO ORDERED** the 4th day of December, 1998.

/s/Richard L. Young
Richard L. Young
District Judge
United States District Court
Southern District of Indiana

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# APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

**ORDER ON PARTIES' JOINT SUBMISSION**

This matter is before Magistrate Judge William G. Hussmann, Jr., pursuant to District Judge Richard L. Young's order of December 4, 1998, and the hearing held February 10, 1999[1]. The following **ORDERS** are entered:

[1]After argument on February 10, 1999, and before the completion of this opinion, the Magistrate Judge was advised that his oldest son, who does not live at home, has applied for an entry level position at rsc, and received a telephone call to set up an interview. He has not attended any such interview at this time, nor has he been offered

## I. The May 15, 1998 Interrogatories:

| | |
|---|---|
| #1 | Defendants are **ORDERED** to serve their answer to this interrogatory by September 15, 1999. |
| ##2, 11, 23, 42 | Motion to Compel in **DENIED**; objection is **SUSTAINED.** |
| #3 | Objection is **OVERRULED;** defendants shall provide a preliminary listing of witnesses which shall be supplemented as required by Fed.R.Civ.P. 26. |
| ##4, 10, 25 | Motion to Compel is **DENIED**; defendants shall supplement their answer if required by Fed.R.Civ.P. 26. |
| #5 | Defendants are **ORDERED** to supplement their answer as to subparagraphs (e), (f) and (g) [as (g) relates to a field supervisor for administration of "Pre*Vision"]. |
| #7 | Defendants are **ORDERED** to serve their answer to this interrogatory by September 15, 1999. |
| ##8, 9 | Defendants are **ORDERED** to serve their answers to the first three paragraphs of these interrogatories by March 15, 1999. Defendants need not answer the fourth paragraph, but see subparagraph III(a)(3) below. |

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any position. The Magistrate Judge does not believe that this development has influenced in any manner his decision in this order. However, he wishes to disclose it to the parties for their consideration.

| | |
|---|---|
| #12, 41 | Motion to Compel is **GRANTED.** |
| #22 | Defendants are **ORDERED** to answer the first six sentences of this interrogatory. Otherwise, the Motion to Compel is **DENIED.** |
| #24 | Motion to Compel is **DENIED**, but see subparagraph III(b) below. |
| #29 | Objection is **OVERRULED**; defendants are **ORDERED** to respond to the first two sentences of this interrogatory. |
| #31 | Objection is **OVERRULED, in part**; defendants' answer may be limited to identifying each witness who will testify to facts establishing that rsc's alleged trade secrets have no actual or potential economic value. |

**II. The May 15, 1998 Third Request for Production:**

| | |
|---|---|
| Request #1 | Defendants are **ORDERED** to produce the items that are specifically referenced in any answers to interrogatories. |

**III. The April 10, 1998 Second Request for Production to IPSOS Publicite and IPSOS USA:**

The Motion to Compel all of these requests for production is **DENIED** because the requests individually and collectively are over broad to the extent the requests seek the following types of information:

(a) With respect to financial information, each party shall produce to the other, for the period of 1998 through the current date[2]:

(1) copies of any corporate financial reports required to be filed by any state or federal regulatory body. If a defendant corporation is not domiciled in the United States, it must produce any report required to be filed by the appropriate national or provincial government in the country in which the organization is domiciled;

(2) copies of any audited financial statements in which line items for revenues, expenses or profits from the sales of "Pre*Vision" or "ARS Persuasion" are specifically stated. The parties may redact all other information except those lines which specifically describe "Pre*Vision" or "ARS Persuasion"; and

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[2] The Magistrate Judge has taken the unusual step of requiring the parties to mutually answer interrogatories 8 and 9 originally submitted by plaintiff. The reason for this decision is as follows. This litigation is between two direct competitors in the same market. Plaintiff alleges misuse of its trade secrets, and has sought as damages the profits which it contends defendants received from selling a product which incorporates its trade secrets. Discovery of the revenues, the expenses incurred, and the profits made by the defendants are proper subjects of discovery. In obtaining this information, the plaintiff will receive a tremendous amount of confidential information including pricing, expense and profit margins, and in verifying this information it may discern who the defendants' clients are and have been for the last decade. Plaintiff has argued that because it is not seeking damages related to their own loss of business, evidence concerning their own financial condition is not relevant to the case. While this may be true, failure to require mutual disclosure is this information will result in one party having a significant competitive advantage over the other. The protective order in this case does not prohibit key decision makers from seeing key information. In order to prohibit one party from obtaining a significant competitive advantage regardless of the outcome of the litigation, the Magistrate Judge concludes mutual disclosure should be required.

(3) responses to interrogatories 8 and 9 (above) with respect to its competing product. With respect to these answers, each party shall make available for inspection by one designated person from the other party, at the location where the data is kept in the normal course of business, all records from which the answer to the interrogatory was calculated.

(b) For the period 1991 until the present, the defendants shall provide the plaintiff each written document which creates any business entity or joint venture with an unrelated entity (that is, an entity not a parent or subsidiary of the defendants), which entity offers "Pre*Vision" anywhere in the world.

(c) With respect to how any product referred to as "Pre*Vision" or "ARS Persuasion" was comprised, or how it changed over time, the following information shall be provided for the period 1988 to the current date:

(1) any and all operations manuals or documents provided to employees directing low the product should be administered;

(2) all advertising brochures or promotional materials, including any videotapes, which were sent to customers or potential customers; and

(3) for each year and country in which the product was offered, four pre-post test files considered to be representative of files kept in the regular course of business reflecting how the product was actually administered.

(d) With respect to documents describing the relationship between the defendants, the defendants shall produce:

(1) all corporate minute books and articles of incorporation; and

(2) all correspondence or documents kept in the files of any corporate officer that describes the purpose or reasons for the formation of the entity.

**IV. As to the items raised in TAB B which are Requests for Production and Requests for Admissions directed to the plaintiff:**

The Motion to Compel directed to IPSOS Marketing Systems' Requests for Production 11 and 13 is **DENIED**, but those requests are governed by the Magistrate Judge's orders at subparagraphs III(a), (b) and (c) above, and production in compliance with those directions is required.

The Motion to Compel is **GRANTED** as to the IPSOS S.A.'s Requests for Admissions 3, 4 and 10.

**V. Miscellaneous:**

(a) As indicated in the December 4, 1998 order, all items ordered produced shall be provided to the opposing party within fifteen (15) days of the date of this order. The parties are reminded that Judge Young's order of December 4, 1998, denied all pending motions, including those objections to the Magistrate Judge's prior orders. Therefore, full production of all items required by this order should proceed without awaiting further order from Judge Young.

(b) The Magistrate Judge also **ORDERS** that the final brief in the response to defendants' Motion for Partial Summary Judgment be filed thirty (30) days after completion of discovery depositions. This is because the issues raised concerning tolling of the limitations period and the issue of whether there may be separate and distinct violations of trade secrets are not frivolous. The Motion for Partial Summary Judgment will not totally resolve the issues before the court. Therefore, allowing discovery to go forward before final response will not significantly harm the defendants.

**SO ORDERED** this 24th day of February, 1999.

/s/William G. Hussmann, Jr.
William G. Hussmann, Jr.
Magistrate Judge
United States District Court
Southern District of Indiana

Copies to:

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# APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

## MAGISTRATE JUDGE'S ORDER

The parties to this action appeared before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, at 10:00 a.m., on December 29, 1999, for an emergency Rule 16 conference. The plaintiff was represented by counsel, Barbara Bison Jacobson and William E. Statham. The defendants were represented by counsel, Martin Tully, John Hagan and Alex Demitrief.

Thereupon, the following **ORDERS** were entered:

1. The plaintiff's Motion to Enforce Magistrate's February 24, 1999 Order filed December 17, 1999, is **GRANTED**. The defendants are ordered to produce appropriate test filings and financial data for the countries of Mexico, Hungary, Argentina, Belgium, Chile and Brazil on or before January 14, 2000.

2. The plaintiff's Motion for Extension of Time to Complete Depositions filed December 17, 1999, is **GRANTED** as follows:

(a) The following depositions shall be taken in London between January 10 and 21, 2000:

(1) Michael Denny;

(2) Martin Oxley;

(3) Michael Hoppe;

(4) Laurence Soubrane;

(5) Luigi Ferrari, or a designated person if Mr. Ferrari is no longer employed by an IPSOS entity;

(6) Carlos Harding – for one day, unless by agreement of the parties, he makes himself available on both January 24 and 25, 2000, in the United States;

(7) William Moult; and

(8) Jan Awad, whose discovery deposition shall be completed not less than 72 hours before any deposition taken to perpetuate evidence for trial.

(b) The deposition of Sue Ernspiger shall be taken on February 8, 9 and 10, 2000, in Evansville, Indiana.

(c) The deposition of Mary Pat Trainum shall be taken on February 15, 16 and 17, 2000, in Evansville, Indiana.

(d) The deposition of Miss Frasher will be taken, if she is within the subpoena power of the court, during the depositions done in February in Evansville, Indiana.

(e) The deposition of David Brandt, Roger Flechsig and Martijn Kist shall be taken during the week of February 21, 2000.

(f) The deposition of Francois Laypeyronie shall be taken in Connecticut during the week of January 31, 2000.

(g) The depositions of Marcelo Basso Dastuge and Mr. Lohfeldt will be taken in Buenos Aires during the week of February 28, 2000.

(h) The deposition of Arturo Sanchez De La Vega shall be taken via telephone during the week of January 24, 2000.

3. Disclosure of experts pursuant to Fed.R.Civ.P. 26(a)(2) shall be completed by March 3, 2000, by the party with the burden of proof. Any rebuttal experts shall be disclosed pursuant to the rule by March 17, 2000.

4. The parties shall comply with Fed.R.Civ.P. 26(a)(3) by March 3, 2000.

5. The plaintiff's response to the currently pending summary judgment motion shall be filed on or before March 10, 2000.

6. Any additional motions for summary judgment shall be filed by not later than February 1, 2000. Response and reply will be pursuant to the local rules. The court is advising the parties that the failure to resolve a summary judgment motion will not in this case be grounds to delay the trial date.

7. A **FINAL PRE-TRIAL CONFERENCE** is set for **FRIDAY, MARCH 17, 2000,** at 1:00 p.m., Evansville time (CST), before the Honorable Richard L. Young, District Judge, in Room 310, Federal Building, Evansville, Indiana. All attorneys must be present **in person** for this conference. Clients with

authority to settle this case are to be available by telephone at the time of this conference.

8. On or before March 16, 2000, the parties shall meet in person to pre-mark and exchange all exhibits which each party intends to introduce into evidence in this case. The purpose of this meeting is:

(1) to assure that each party has seen all the other parties' exhibits before trial;

(2) to mark and organize the exhibits so they can be easily found at trial, thereby saving the jurors' time and reduce confusion about exhibit identification;

(3) to encourage the stipulation into evidence of as many exhibits as is possible; and

(4) to alert the parties and the Court of unusual evidentiary problems prior to trial.

The parties shall jointly prepare an exhibit notebook for the Court containing the original of all documentary exhibits which can be stipulated into evidence and a copy of each exhibit which any party intends to introduce into evidence but which cannot be stipulated into evidence.[1] Using numbers, the parties shall mark

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[1] The parties are advised that the Court now has a sophisticated evidentiary presentation system known as "VEPS" (Video Evidence Presentation System). This

each exhibit which can be stipulated into evidence as "Stipulated Exhibit Number ____" and provide a separate index tab for each document. For those documentary exhibits which cannot be stipulated into evidence, plaintiff shall mark its exhibits as "Plaintiff Exhibit *Number* ___" and defendants shall mark their exhibits as "Defendant Exhibit *Letter* ____." All of these proposed exhibits shall be placed into the Court's notebook with a separate index tab for each exhibit. **Documents which are not made part of the Court's notebook will not be considered at trial except upon a showing of extraordinary good cause and diligence in the pursuit of the evidence.**

After examination of the opposing party's exhibits which cannot be stipulated into evidence, if any party contends that another party's exhibit is not admissible for any of the following reason, the party objecting to the introduction of the evidence

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system allows projection of tangible objects, documents, videotapes, and computer-generated evidence onto television monitors which will be placed near the jury box. **At least one week prior to the trial, counsel shall make an appointment with the Clerk of Court to obtain instructions as to how to use the system.**

*shall file a brief* describing the reason why the exhibit is not admissible:

(a) the exhibit is not authentic or does not comply with Fed.R.Evid. 901-903;

(b) an original of a document is required or a copy is not admissible under Fed.R.Evid. 1001-1007;

(c) the exhibit is not admissible pursuant to Fed.R.Evid. 407-411; or

(d) the exhibit is not admissible because a privilege applies.

**In the absence of this brief, the Court will not consider an objection at trial which could have been raised by this procedure.** The Court will, of course, consider at trial relevancy, hearsay and other objections which could not reasonable be anticipated.

9. On or before March 24, 2000, the parties shall file the following:

(a) proposed preliminary and final jury instructions,[2]

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[2] An original and one copy of the jury instructions shall be provided to the Court. These instructions are to include citation to authority. **If possible, the parties shall also provide a 3-1/2" diskette to the Court on which the instructions have been copied in a format compatible with WordPerfect 6.1 for Windows.**

(b) jury voir dire questions;

(c) motions in limine; and

(d) the exhibit notebook described above and any briefs on evidentiary matters.

10. For any expedited transcript requests during trial, you should contact the court report no later than fourteen (14) days in advance of trial.

This order has been formulated after a conference at which counsel for the respective parties have appeared. Counsel shall file any corrections or additions within ten (10) days after receipt of this order.

**ENTERED** this 5th day of January, 2000.

/s/William G. Hussmann, Jr.
William G. Hussmann, Jr.
Magistrate Judge
United States District Court
Southern District of Indiana

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# APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

## MAGISTRATE JUDGE'S ORDER

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on a Motion for Relief from Magistrate Judge's Order Dated January 5, 2000, and a Discovery Status Report, both of which were filed by the plaintiff on January 11, 2000. (Docket Item 314, 320). A telephonic hearing was held before the Magistrate Judge on January 12, 2000, at 9:00 a.m. The plaintiff was represented by counsel,

Barbara Bison Jacobson. The defendants were represented by counsel, Alex Dimitrief and John Hagan.

1. The plaintiff's motion for relief is **GRANTED**. The deposition of Ms. Awad shall be conducted on January 17 or 18, 2000, in Edinburgh.

2. In light of disclosures concerning Laurence Soubrane, as is set out in the plaintiff status report, the Magistrate Judge concludes that Ms. Soubrane must be treated in like manner as Ms. Awad and is not an employee under the control of IPSOS. She will need to be deposed, if at all, in the location where she currently resides.

3. Both parties to this case are entitled to inspect invoices and documents which support any conclusory damage documents which have been produced in discovery to date. Rsc shall allow inspection of any underlying documents in a location where the documents currently exist on or before February 1, 2000. The IPSOS defendants shall allow inspection of documents, if any such documents exist, while the plaintiff's counsel is in London. Upon failure to do so, IPSOS shall direct copies of the said

documents to counsel for the plaintiff on or before February 1, 2000.

4. The prior pre-trial scheduling orders are amended only in the following particulars:

(a) The plaintiff shall file a final statement of contentions and a final specification of damages on or before March 10, 2000.

(b) The defendants shall file responsive contentions and final witness and exhibit lists on or before March 17, 2000.

**ENTERED** this 12th day of January, 2000.

/s/William G. Hussmann, Jr.
William G.Hussmann, Jr.
Magistrate Judge
United States District Court
Southern District of Indiana

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# APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

Entry for March 17, 2000

Before the Hon. Richard L. Young, Judge

Come now the parties, by counsel for the final pre-trial conference of this cause.

The plaintiff files with the court a motion to continue the April 3rd trial date, which motion is DENIED by the court.

The court advises the parties about jury selection procedures and that the jury will consist of eight (8) person jury.

The court VACATES the trial date of April 3rd and advises the parties that this date will be used to dispose of any pending motions. The trial is RESET of April 4, 2000 at 9:00 a.m.

The Court directs the parties to meet with Magistrate Judge Hussmann for settlement negotiations.

Copies: All counsel of record

# APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, IPSOS USA and IPSOS S.A., | ) | |
| Defendants. | ) | |

Entry for April 3, 2000

Before the Hon. Richard L. Young, Judge

Come now the parties, by counsel, for the oral argument on the parties pending motions.

The Court, after hearing argument from counsel, now rules as follows:

1. Motion in limine filed 3/24/00 to preclude the testimony of Karl E. Rosenberg is taken UNDER ADVISEMENT.

2. Motion to strike witnesses Michael von Gonten and Karl Rosenberg and motion for sanctions file 3/22/00. The motion for sanctions is DENIED. The motion to strike is taken under advisement. The defendant is to provide to the court for *in camera* inspection the report of von Gonten and the confidentiality agreements.

3. Motion for sanctions filed 3/29/00 for abuse of process is withdrawn.

4. Motion to strike Malcolm McNiven from IPSOS's expert witness list and motion for leave to file motion in limine. The motion to strike is DENIED. The motion to for leave to file motion in limine is GRANTED.

5. Objections to proposed jury voir dire is GRANTED in part and DENIED in part.

6. Combined motion and memorandum to strike unauthenticated letters attached to IPSOS's brief filed 3/3/0/00 is DENIED.

7. rsc's preliminary objections pursuant to FRCAP 26(a)(3)C)(I) and motion for extension of time to file objections file 3/17/00 is DENIED upon the defendants representation that defendant's testimony will not be used except for impeachment.

8. Motion for leave to file brief of additional and more specific objections to defendant trial exhibits filed 3/24/00 is GRANTED.

9. rsc's supplement to combined motions to strike defendants' trial exhibits and motion for sanctions filed 3/31/00 is DENIED.

10. The 2nd motion for continuance will be argued after all other motions have been ruled on.

11. rsc's motion to use transcripts and depositions without changes of substance filed 4/3/00 will be ruled on by the court during the trial on a case by case basis.

Defendant IPSOS's Pending Motions

1. Motion to preclude Hans-Willi Schroiff from testifying as an expert witness filed 3/9/00 is GRANTED.

2. Motion to preclude expert testimony from plaintiff's employee witnesses that was not properly disclosed filed 3/24/00 is taken UNDER ADVISEMENT.

3. Motion to preclude the plaintiff from introducing or eliciting any evidence regarding the origin and development; and any allegedly "non-public" aspects of the ARS persuasion methodology filed 3/7/00 is DENIED.

4. Motion to sanction plaintiff for intimidated witness Jan Awad filed 3/21/00 is DENIED.

5. Motion in limine to preclude the testimony of any evidence relating to size, new worth or profitability of the defendant filed 3/24/00 is DENIED.

6. Motion in limine to preclude the plaintiff's from arguing that the absence of former IPSOS employees should be held against the defendants filed 3/24/00 is GRANTED.

7. Motion to preclude evidence and establish certain facts based on plaintiff's refusal to produce rsc's "Standard Sales Presentation" regarding ARS persuasion filed 3/24/00 is taken UNDER ADVISEMENT.

8. Motion for sanction for violating the courts 5/27/00 order filed 3/24/00 is DENIED.

9. Motion to preclude rsc's claim for lost profits and/or reasonable royalties filed 3/27/00 is GRANTED as to lost profits and DENIED as to reasonable royalties.

10. Motion to preclude the plaintiff from introducing the proffered testimony of their damages expert filed 3/24/00 is taken UNDER ADVISEMENT.

11. Motion to bifurcate on issues of liability and damages filed 3/3/00 is DENIED.

12. Motion to Reconsider or Clarify part of the Courts ruling on Summary Judgment motion filed 4/3/00 is taken UNDER ADVISEMENT and the plaintiff is given time to file a response.

The Court now hears argument from counsel regarding the second motion to continue trial date filed by plaintiff. The Court now VACATES the trial date of 4/4/00 and hereby RESETS this matter for trial by jury on 4/6/00 commencing at 9:00 a.m.

Copies: All counsel of record

# APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

| | | |
|---|---|---|
| RESEARCH SYSTEMS CORPORATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. EV 97-10-C Y/H |
| IPSOS PUBLICITE, et al., | ) | |
| Defendants. | ) | |

## JURY VERDICT FORM – SPECIAL INTERROGATORIES

We the jury, upon our oaths, unanimously answer the following questions:

**Trade Secret Misappropriation**

1. Do you find that rsc disclosed any information regarding ARS Persuasion to IPSOS S.A. and/or IPSOS Publicite, today known as IPSOS Insight Marketing, (please

circle which) that is not generally known or readily ascertainable by proper means?

| Yes | No |
|---|---|
| _____ | X |

2. If you answered "yes" to question No. 1, do you find that IPSOS S.A. and/or IPSOS Publicite (please circle which) used or disclosed any such confidential or trade secret information regarding ARS Persuasion?

| Yes | No |
|---|---|
| _____ | _____ |

3. Do you find that IPSOS S.A. and/or IPSOS Publicite (please circle which) had access to rsc's information about ARS Persuasion that was confidential, proprietary and trade secret?

| Yes | No |
|---|---|
| _____ | X |

4. Do you find that IPSOS S.A. and/or IPSOS Publicite independently developed PRE*VISION?

| Yes | No |
|---|---|
| X | _____ |

5. Although not required to, do you find that IPSOS S.A. and/or IPSOS Publicite have shown that they did not use rsc's trade secrets in revision PRE*VISION?

| Yes | No |
|---|---|
| | |

**Constructive Fraud**

6. Do you find that rsc was in an unequal, dependant, uniformed and weaker position compared to IPSOS S.A. and IPSOS Publicite during the parties' joint venture negotiations such that rsc was in an inferior and subordinate position to that of IPSOS?

| Yes | No |
|---|---|
| | X |

7. Do you find that rsc actually and reasonably relied to its detriment on any misrepresentation by IPSOS S.A. and/or IPSOS Publicite (please circle which) regarding IPSOS's dealings with RSL in 1991?

| Yes | No |
|---|---|
| | X |

8. Do you find that IPSOS S.A. and/or IPSOS Publicite (please circle which) ever offered PRE*VISION for sale in the United States for use in the United States?

_____ Yes  X No

9. If you answered "yes" to question No. 8, do you find that IPSOS S.A. and/or IPSOS Publicite (please circle which) made any knowingly, intentionally, and literally false statements in advertising PRE*VISION to customers?

_____ Yes  _____ No

10. Do you find that IPSOS S.A. and/or IPSOS Publicite misrepresented the nature, characteristics, qualities or origin of its PRE*VISION product?

_____ Yes  X No

Signed:

/s/James Downs
Foreperson

4-27-00
Date

## APPENDIX M

# UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

**JUDGMENT IN A CIVIL CASE**

CASE NUMBER: EV 97-10-C-Y/H

**Jury Verdict.** This action came before the Court for a trial by jury, The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by way of their complaint.

April 27, 2000
*Date*

*Clerk*

s/Dana Shuler -
*(By) Dana Shuler, Deputy Clerk*

## APPENDIX N

# United States Court of Appeals

**For the Seventh Circuit**

**Chicago, Illinois 60604**

**JUDGMENT – WITH ORAL ARGUMENT**

**Date: January 9, 2002**

**BEFORE:** Honorable RICHARD A. POSNER, Circuit Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

Nos. 00-3742 & 00-4073

RESEARCH SYSTEMS CORPORATION,
Plaintiff – Appellant

v.

IPSOS PUBLICITE, IPSOS USA, IPSOS, et al.,
Defendants – Appellees

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division
No. 97 C 10, Richard L. Young, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

## APPENDIX O

In the

# United States Court of Appeals

For the Seventh Circuit

Nos. 00-3742 and 00-4073

RESEARCH SYSTEMS CORPORATION,
*Plaintiff-Appellant,*

*v.*

IPSOS PUBLICITE, IPSOS USA,
IPSOS, et al.,
*Defendants-Appellees.*

Appeals from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 97 C 10 – **Richard L. Young**, *Judge.*

ARGUED NOVEMBER 2, 2001–DECIDED JANUARY 9, 2002

Before POSNER, RIPPLE and EVANS, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The Plaintiff, research systems corporation ("RSC"), sued IPSOS S.A. and several of its subsidiaries (collectively "IPSOS") for breach of contract,

misappropriation of trade secrets (under Indiana and federal law), constructive fraud and false advertising. The district court entered summary judgment for IPSOS on RSC's state law misappropriation claim, and a jury found for IPSOS on the rest of the claims. RSC appeals the grant of summary judgment, the entry of judgment against it following the jury verdict, the denial of its motion for a new trial, the denial of a post-trial motion for sanctions against IPSOS, and the granting of a post-trial motion IPSOS made to recover some of its expert witness fees from RSC. For the reasons set forth below, we affirm the judgment of the district court in all respects.

## I

## BACKGROUND

### A. Facts

RSC is an advertising research company. It sells a product called "ARS Persuasion." Which is a system for testing the effectiveness of television commercials. In 1989, the French advertising research company IPSOS Publicite, a subsidiary of IPSOS S.A., approached RSC regarding a possible joint venture between IPSOS and RSC to market a testing system in France. IPSOS sold a testing system called Pre*Vision in France, but wanted to develop a new system to attract the business of Proctor & Gamble ("P&G").

Representatives of IPSOS and RSC began to negotiate seriously in September 1990. The presidents of IPSOS Publicite and IPSSO S.A. each signed a confidentiality agreement with RSC covering information that the companies would share. In December 1990, representative of IPSOS visited RSC headquarters in Evansville, Indiana, and received a guided tour of the facility. During the visit, RSC furnished the IPSOS representatives with proposed joint venture and license

agreements. The terms of the agreements were not acceptable to IPSOS, however, and the two companies were unable to reach any further agreement. RSC had been pursuing similar arrangements with other European advertising research companies as well, but there, too, could reach no final agreements. In early 1991, IPSOS and the two other European companies with which RSC had negotiated, Research Services Limited ("RSL") of the United Kingdom and the Sample Institute (Sample) of Germany, put together a joint proposal to RSC for the licensing of ARS Persuasion in Europe. RSC rejected the offer, and negotiations between RSC and the European companies ended in August 1991.

By September 1991, IPSOS in collaboration with Sample had revised its Pre*Vision product to make it compatible with the RSL and Sample products used by P&G in the UK and Germany. RSC learned of the revised Pre*Vision in September 1991.

**B. District Court Proceedings**

RSC filed suit in December 1996 in an Indiana state court for misappropriation of trade secrets and breach of contract. IPSOS removed the case to federal court in January 1997 and filed for partial summary judgment in March 1998 on the ground that the state law misappropriation claims were time-barred. The court granted RSC's motion to delay its response until thirty days after discovery. In February 1999, the court permitted RSC to amend its complaint to add two new parties and claims of constructive fraud and false advertising and misappropriation under the Lanham Act. RSC sought permission to amend its complaint again in November 1999 to add more new parties and new claims, but the court denied the motion, explaining that more delay was not in the interest of justice. Over the course of discovery, each party filed numerous motions to compel. In June 1999, the court scheduled a trial date for April 3, 2000. In December 1999, the court ordered the parties to word out a

discovery schedule that would lead up to the April 2000 trial. According to the schedule, on which the parties agreed, each party's witness lists and exhibits were to be disclosed by March 3, 2000, and IPSOS was to disclose its potential expert witnesses by March 17, 2000. Each party's disclosures were timely.

On March 17, 2000, RSC moved for a continuance, but the court denied the motion. It also moved the trial to April 4, reserving April 3 as a day to resolve any pending motions. One March 23 and 24, 2000, both parties made several motions in limine, including motions for sanctions, which the court rejected. On March 31, the court granted IPSOS' motion for partial summary judgment on the state law misappropriation claims, holding that the claims were time barred. RSC moved for a continuance of the trial on April 3. The court granted the motion and moved the trial date to April 6. The jury returned a verdict for IPSOS on all claims, and the court entered judgment on the jury verdict for IPSOS. It denied RSC's motion for a new trial on September 15. RSC then filed another motion for sanctions, which the court denied. Finally, on October 24, 2000, the court granted IPSOS' motion to recover expert witness fees from RSC. RSC had deposed the proffered witnesses, but had refused to pay the witnesses' fees after IPSOS decided not to call them at trial.

## II

## DISCUSSION

### A.

RSC claims that IPSOS' pretrial conduct and the district court's denial of RSC's motions for continuances violated RSC's due process right to a full and fair trial. The crux of RSC's argument is that IPSOS purposefully delayed its delivery of discovery materials until the month before trial and that the delay interfered with RSC's ability to prepare for trial. RSC made two motions for continuances: the first on March 17, 2000, and the second on

March 28, 2000. The district court summarily denied the first and reserved decision on the second until it could hear oral argument on the motion. The court granted a continuance, moving the trial date from April 4 to April 6, 2000, but RSC maintains that the two-day extension was inadequate.

"We review the trial court's denial of the continuance for abuse of discretion." *United States v. $94,000.00 in United States Currency,* 2 F.3d 778, 787 (7th Cir. 1993). RSC carries a heavy burden, for "[t]he decision concerning whether to grant a continuance is left to the broad discretion of the district court." *United States v. Withers,* 972 F.2d 837, 845 (7th Cir. 1992). "Matters of trial management are for the district judge; we intervene only when it is apparent that the judge has acted unreasonably." *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.,* 799 F.2d 265, 269 (7th Cir. 1986). The district court's rulings on RSC's motions for continuances were not unreasonable. The court ordered the parties to work out a schedule that would allow trial to proceed on the scheduled date. RSC and IPSOS agreed to the schedule, and the discovery materials that RSC complains of receiving only in the month before the trial were delivered timely according to that schedule. Nowhere in its brief does RSC claim that any discovery materials were produced late according to the agreed-upon schedule. Furthermore, the district court was aware of how long it had taken the case to get to trial and how many resources of the parties and the court is already had consumed. In denying RSC's November 1999 motion to file a second amended complaint,[1] which would have added another party to the litigation, the court noted:

> The plaintiff's original complaint was filed on December 16, 1996....A trial date is set for April 3, 2000. Discovery has been extensive and extremely expensive. The parties have each exchanged 33,000 to 40,000 pages of materials and have filed numerous motions to compel. Depositions

[1] The district court's ruling denying leave to file a second amended complaint is not contested on appeal.

> have required at least two and possibly three trips to Europe. There are contemplated depositions in South America. The plaintiff was previously granted leave to file a first amended complaint in July 1999.

R.322 at 2. Give that "district judges must be allowed considerable leeway in scheduling civil cases, and therefore in denying continuances that would disrupt their schedules," *N. Ind. Pub. Serv. Co.,* 799 F.2d at 269, we cannot say that the district court abused its discretion in ruling as it did on RSC's motions for continuances.[2]

**B.**

RSC contends that the district court abused its discretion by denying its motion for sanctions for the "obstructive tactics" of defense counsel. The tactics, RSC claims, thwarted RSC's efforts to bring the case to trial and increased its cost of doing so. The district court did not abuse its discretion. "District courts possess wide latitude in fashioning appropriate sanctions," and this court will not disturb the decisions unless they are unreasonable. *Johnson v. Kakvand,* 192 F.3d 656, 661 (7th Cir. 1999). RSC agreed to the schedule according to which IPSOS made its pre-trial disclosures. It has not shown any misconduct on the part of IPSOS that would have been subject to sanctions. Thus, the district court's denial of RSC's motion was not unreasonable, and we shall not disturb it.

**C.**

RSC contends that the district court erred in granting IPSOS recovery of the expert witness fees. First, as the district court noted in its order, Federal Rule of Civil Procedure 26(b)(4)(A)

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[2] RSC submits that the timing of IPSOS' disclosures prevented it from adding another party, RSL, to the action. However, as the district court noted in denying RSC's motion to file a second amended complaint that would have added RSL to the suit, RSC had notice that RSL might be using its purported trade secrets as early as June 14, 1996.

permits a party to depose an expert whose opinion may be presented at trial. *See* Fed.R.Civ.P. 26(b)(4)(A). Rule 26(b)(4)(C) provides: "Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision..." Fed.R. Civ.P. 26(b)(4)(C). RSC deposed IPSOS' expert witnesses, and the court properly required RSC to pay for the costs of those depositions.

RSC alleges, however, that IPSOS never intended to call the experts at trial, and disclosed them just to distract RSC from its trial preparations and to burden RSC with the added expense of deposing the witnesses. RSC offers no specific evidence to support its allegations. Here, we would expect the trial judge – who is closer to, and more familiar with, the pre-trial actions of the parties – to have discovered any abuse that might not be apparent to us on the face of the record. Absent any indication of the scheme RSC attributes to IPSOS, the district court did not abuse its discretion in granting IPSOS' notion to recover the fees it incurred in making the experts available for RSC to depose.

**D.**

RSC next asks this court to reverse the district court's denial of RSC's motion for a new trial. A party seeking to reverse a district court's denial of a motion for a new trial "bears a particularly heavy burden." *Lowe v. Consol. Freightways of Del., Inc.* 177 F.3d 640, 641 (7th Cir. 1999). A motion for a new trial should succeed "[o]nly when a verdict is contrary to the manifest weight of the evidence...." *Cefaly v. Vill. Of Elk Grove,* 211 F.3d 416, 424 (7th Cir. 2000). The district court, having seen the presentation of the evidence and observed the witnesses, "is in a unique position to rule on a new trial motion." *Id.* At 424. This, "[o]nly if the district judge has abused her discretion will we disturb her decision to deny a new trial." *Id.* This court will not overturn a jury verdict if a reasonable basis exists in the record to support it. *See Jackson v. Bunge Corp.*, 40 F.3d 239, 244 (7th Cir.

1994). In reviewing the record, this court will not reweigh the evidence; rather, we must view the evidence in the light most favorable to the prevailing party, IPSOS, and draw all reasonable inferences in its favor. *See Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 939 (7th Cir. 2001).

RSC ignores this standard of review. It does no more than point to some evidence and some inferences from the evidence that weigh in its favor. It makes no mention of the evidence supporting the jury's verdict. Viewing the evidence in the light most favorable to IPSOS, as we must, it is apparent that the jury's verdict is not against the weight of the evidence.

The jury made several specific findings that RSC now challenges. With respect to RSC's misappropriation claim, the jury determined that RSC had not disclosed any information regarding its product, ARS Persuasion, to IPSOS that was not generally known or readily ascertainable by proper means. The jury also found that IPSOS did not have access to any confidential or proprietary information of RSC. RSC contends that the evidence demonstrates otherwise. RSC submits that its employee, Jan Awad, provided IPSOS with RSC's "standard error formula" as a correction to IPSOS' formula. Evans if the formula was given, however, RSC has not pointed to any evidence to show that the standard error formula was not readily ascertainable by proper means. Moreover, Awad was the only witness to testify about the formula and her testimony was vague and the jury was justified in not accepting it as sufficient to prove RSC's case. RSC also claims that IPSOS received secret information during the Operations Overview Tour that RSC provided of its facility. However, RSC has not invited our attention to any evidence in the record to show that the information provided on the tour consisted of trade secrets. The jury was entitled to believe IPSOS S.A. president, Didier Truchot, who testified that IPSOS representatives was little more than the sight of people working in their offices. RSC simply did not prove this element of the claim.

The jury also found that IPSOS had independently developed Pre*Vision. RSC claims that this finding is inconsistent with the evidence that IPSOS developed Pre*Vision from methodologies developed by other European marketing firms. Whether IPSOS borrowed from other European companies is irrelevant to the question of whether IPSOS misappropriated RSC's trade secrets. The issue was whether IPSOS had developed Pre*Vision independently of RSC's information. Carlos Harding, the IPSOS executive responsible for revising Pre*Vision, testified that IPSOS developed Pre*Vision from information derived from IPSOS' interactions with other European companies and with its clients. The jury was entitled to believe him.

With respect to RSC's constructive fraud claim, the jury found that RSC was not in a weaker negotiating position that IPSOS and that RSC did not rely on any misrepresentations by IPSOS. RSC claims that the evidence does not support the jury's determination. "Constructive fraud may be found where one party takes unconscionable advantage of his dominant position in a confidential or fiduciary relationship." *Estates of Kalwitz v. Kalwitz*, 717 N.E.2d 904, 913 (Ind. Ct. App. 1999). The only evidence RSC cites to support its claim that IPSOS was in a dominant position are letters from RSC asking IPSOS for information on the European marketplace, indicating that it knew less than IPSOS about the European marketing research industry. The jury heard evidence, however, that IPSOS was a small company at the time of the negotiations and the RSC had alternative plans if its negotiations with IPSOS fell through, indicating that RSC was not dependant upon any cooperative venture with IPSOS. Thus, the jury's finding that RSC had failed to prove a necessary element of its claim is not against the weight of the evidence.

Turning to its false advertising claim, RSC challenges the jury's findings that IPSOS never had offered Pre*Vision for sale in the United States and that IPSOS had not misrepresented the

nature, characteristics, qualities or origin of Pre*Vision. Under the Lanham Act, which generally proscribes the false description of goods and their origins, the plaintiff must show, among other things, that the defendant made false or misleading statements concerning goods entering interstate commerce. *See B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999). We need not decide whether the evidence supports the jury's determination that IPSOS did not place Pre*Vision in interstate commerce because the jury's finding that IPSOS did not misrepresent the nature, characteristics, qualities or origin of Pre*Vision is consistent with the weight of the evidence. In this respect, RSC focuses on IPSOS' claim in the Pre*Vision marketing material that the revised Pre*Vision was developed in part from experience supply P&G with "O.R.S.," a product that the German company, Sample, had been supplying to P&G in the later 1980s. RSC argues that Pre*Vision could not have been developed from experience supplying P&G with O.R.S. because IPSOS was not a supplier of O.R.S. at the time the revised Pre*Vision was developed between March and July 1991. As RSC admits, however, IPSOS developed the revised Pre*Vision in collaboration with Sample. Thus, because Sample had supplied O.R.S. to P&G and had collaborated on the development of the revised Pre*Vision, the jury could have reasonably concluded that IPSOS made no misrepresentation.

Finally, RSC urges that the evidence does not support the jury's verdict for IPSOS on RSC's breach of contract claim. IPSOS and RSC signed a confidentiality agreement whereby each party promised not to disclose the information shared with the other. The agreement explicitly excepted information that "(i) was earlier known to the receiving party; (ii) is or becomes known to the public other than through disclosure by the receiving party; or (iii) is disclosed to the receiving party by a third party having a right to disclose such information." Plaintiff's Trial Exs. Vol.VII at 1013. The jury found that RSC had not disclosed any information regarding its product to IPSOS that was not generally known or readily ascertainable by proper means. That finding, as

discussed above, was not against the weight of the evidence. Thus, the jury found that whatever information IPSOS had received from RSC was within the exception to the confidentiality agreement. Therefore, the verdict in favor or IPSOS on RSC's breach of contract claim was not against the weight of the evidence, and the district court did not err in denying RSC's motion for a new trial.

**E.**

RSC takes issue with five separate rulings by the district court on the admissibility of certain evidence. This court reviews a district court's evidentiary rulings for an abuse of discretion. *See United States v. Smith,* 230 F.3d 300, 307 (7th Cir. 2000). Even if a ruling is erroneous, it will not be overturned unless it is likely that the ruling had "a substantial influence over the jury." *Palmquist v. Selvik,* 111 F.3d 1332, 1339 (7th Cir. 1997) (internal quotation omitted).

First, RSC challenges the district court's exclusion of two memoranda written by Jan Awad describing meetings with IPSOS. RSC sought to have the documents admitted into evidence, but the district court excluded them as hearsay because they were offered for the truth of the matter asserted in the memos. RSC contends that the memos should have been admitted as past recollections recorded. Federal Rule of Evidence 803(5) permits recorded past recollections to be read into evidence, but not to be received into evidence as exhibits unless offered by an adverse party. *See* Fed. R. Evid. 803(5). RSC sought to introduce the memoranda as substantive exhibits, something the rule explicitly prohibits. The district court did not abuse its discretion in excluding the memoranda.

RSC next challenges the admission of an IPSOS document, which purported to be a P&G document describing market test being done in Germany. IPSOS sought to admit the document as evidence of information in the possession of IPSOS' Mr.

Harding, the executive responsible for revising Pre*Vision, and upon which he relied in developing the revised Pre*Vision. The court admitted the document for the limited purpose of showing "that Mr. Harding had it – this document in his file." Tr.V at 1027. RSC claims that the court erred by not requiring IPSOS to establish that the document was authored by P&G. A document is authenticated if the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). IPSOS only claimed that it "was a document that was in [Mr. Harding's] file and that he had it available to him when the changes [to Pre*Vision] were made." Tr.V at 1025. Whether the document was actually from P&G was irrelevant, so long as the document was not from RSC, and RSC never claimed that it was. Thus, the district court did not err in admitting the document.

Next, RSC challenges the sufficiency of certain limiting instructions pertaining to the admission of exhibits concerning other market testing systems. IPSOS sought to introduce the exhibits as evidence that IPSOS had substantial non-RSC information on which to rely in developing its revised Pre*Vision. At sidebar, the court agreed to instruct the jury that the exhibits would not be admitted for the truth of the matter asserted in them, but just as evidence of other information on which IPSOS could have relied. The court may have instructed the jury improperly, because the transcript reads that "it's being offered for the truth." Tr.V at 1014. But any error was harmless because the nature of the testing systems described in the exhibits was irrelevant. What mattered was that IPSOS had still other sources of information on which to rely in developing its own system.

RSC argues that the district court erred in allowing Roger Flechsig, an executive of an IPSOS subsidiary corporation, to testify even though he had not been disclosed as a potential expert witness. IPSOS properly had disclosed Flechsig as a lay witness it would call at trial. RSC objected to Flechsig's

testimony that RSC's product, ARS Persuasion, was not unique in the industry. A non-expert witness may give his opinion if it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of the fact in issue, and (c) not based on scientific, technical, or other specialized knowledge...." Fed.R.Evid. 701. Here, Flechsig's opinion was rationally based on his twenty years of experience as a competitor of RSC. In any event, even if his opinion was based on the specialized knowledge of an expert, the single comment that ARS Persuasion was not unique could not have affected the outcome of the trial.

Finally, RSC claims that the district court erred by admitting Exhibits 41 and 83. Exhibit 41 was a portion of a report on the results of an advertising test performed by Burke Marketing, a competitor of RSC, using Burke's Selector product. Exhibit 83 consisted of some materials that would have been included in the test that is mentioned in the Exhibit 41 report. IPSOS offered the exhibits to show that ARS Persuasion was not unique. RSC objected to the admission of the exhibits on the found that IPSOS had not laid a proper foundation. Federal Rule of Evidence 901(b)(1) provides that an exhibits may be authenticated by testimony of a witness with knowledge that "a matter is what it is claimed to be." Fed.R.Evid. 901(b)(1). Flechsig testified that he had been responsible for the marketing and sale of the Burke Selector product. Therefore, the district court was not unreasonable in concluding that Flechsig was qualified to testify, as he did, that Exhibit 41 was "a true and accurate copy of an excerpt from a Burke Selector report," Tr.XIII at 2434, at that Exhibit 83 consisted of materials that would have been included in a Selector test. The district court did not abuse its discretion in admitting Exhibits 41 and 83.

F.

The district court granted summary judgment for IPSOS on RSC's Indiana Uniform Trade Secrets Act ("UTSA") claim on the ground that the statue of limitations had run. RSC does not

dispute that it learned of the purported misappropriation in October 1991 and filed its claim in 1996. The UTSA provides for a three-year limitations period on misappropriation claims. *See* Ind. Code § 24-2-3-7. Indiana tolls all of its limitations periods, however, for "[t]he time during which the defendant is a nonresident of the state [and does not] maintain in Indiana an agent for service of process or other person who, under the laws of Indiana, may be served with process as agent for the defendant." Ind. Code § 34-11-4-1. IPSOS never has been a resident of Indiana, nor maintained an agent or anyone else for service of process there. At first glance, it might appear that the limitations period for RSC's claim against IPSSO is tolled. The Court of Appeals of Indiana has held, however, that the Indiana rolling provision does not apply "where the party claiming the benefit of the period of limitations was subject to the jurisdiction of a court in [the] state." *Haton v. Haton,* 672 N.E.2d 962, 965 (Ind Ct. App. 1996). Based on *Haton*, the district court held that RSC's claim was time-barred because RSC could have served IPSOS under Indiana's long arm state when it discovered the misappropriation. RSC urges this court to reject the holding of the Court of Appeals of Indiana in *Haton*, at lease as it applies to defendants residing in foreign countries, because of the added burden involved in serving parties abroad.

Because the district court was sitting in diversity, that court, and this court on review, must attempt to predict how the Supreme Court of Indiana would decide this issue. *See Lexington Ins. Co. v. Rugg & Knopp, Inc.* 165 F.3d 1087, 1090 (7th Cir. 1999). "Where the state supreme court has not ruled on an issue, decisions of the state appellate courts control, unless there are persuasive indications that the state supreme court would decide the issued differently." *Id.* The Court of Appeals of Indiana held in *Haton* that "a statute tolling the running of a period of limitations does not apply where the party claiming the benefit of the period of limitations was subject to the jurisdiction of a court in that state." *Haton*, 672 N.E.2d at 965. The court in *Haton* was persuaded by the rationale of the Michigan Court of Appeals,

which noted, "The purpose of a tolling provision is to protect the right of a plaintiff to bring an action and to prevent a defendant from defeating a claim by absenting himself from the jurisdiction. It preserves [the] plaintiff's claim until such time as service on the defendant is made available." *Id.* At 964 (quoting *Frazier v. Castellani,* 342 N.W.2d 623, 626 (Mich. Ct. App. 1983)). When a defendant is amenable to service, application of the tolling provision would serve no purpose, and the court should instead apply the statute of limitations, which is "designed to promote diligence on the part of the plaintiff, to prevent the litigation of stale claims and to establish a reasonable, but limited, time for bringing an action." *Id. Haton,* however, involved a suit for delinquent child support payments following a divorce decree. Unlike here, the court in *Haton* had continuing jurisdiction over the defendant; service of process was not necessary, only notice of the relief sought. *See id.* At 964-65. In the present action, the district court extended the ruling of *Haton* from cases against nonresident defendants over whom the court already had jurisdiction to cases against nonresident defendants over whom the court must yet establish its jurisdiction. Still, the rule's rationale applies here as well, and its application would be consistent with Indiana Law.

Indiana's tolling provision does not apply in cases against defendants who "maintain in Indiana an agent for service of process or other person who, under the laws of Indiana, may be served with process as agent for the defendant." Ind. Code § 34-11-4-1. Indiana law used to permit service to be made upon the Secretary of State in actions against nonresident corporations. *See* Ind. Code § 23-3-3-1 (1982). In such cases, the rolling provision did not apply because the nonresident corporation was amenable to service of process via the Secretary of State. *See Tolen v. A.H. Robins Co., Inc.,* 570 F. Supp. 1146, 1154-44 (N.D. Ind. 1980); *see also Am. States Ins. Co. v. Williams,* 278 N.E.2d 295, 301 (Ind. Ct. App. 1972) (when nonresident motorist was amenable to service via the Secretary of State pursuant to the nonresident motorist statute, the statute of limitations was not

tolled). The statute that allowed service of process to be made on the Secretary of State in actions against nonresident corporations has been repealed and replaced by the long-arm statute under which IPSOS could be served by registered or certified mail. *See* Ind. Code § 23-1-49-10; 1986 Ind. Acts 149, §§ 33, 65. Thus, the rule that the statute of limitations is not tolled if the nonresident defendant is amenable to service of process under the long-arm statute is consistent with Indiana law interpreting the tolling provision, even though the statute itself does not explicitly provide for the exception. Courts in many other states have applied the same exception to tolling statutes under the rationale observed in *Haton*, even though the statutes did not explicitly provide for it. *See, e.g., Alday v. Tecphy Div. Firminy,* 10 F. Supp. 2d 562, 565 (D.S.C. 1998) (applying South Carolina law); *Fernon v. Itkin,* 476 F. Supp. 1,3 (M.D. Fla. 1979) (applying Florida law), *aff'd without op.* 604 F.2d 669 (5th Cir. 1979); *Kennedy v. Lynch,* 513 P.2d 1261, 1263 (N.M. 1973); *Byrne v. Ogle,* 488 P.2d 716, 718 (Alaska 1971); *see also* Kenneth J. Rampino, Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence,* 55 A.L.R.3d 1158, § 4[b] (1974 & Supp. 2000) (listing cases). Lastly, the Supreme Court of Indiana itself has embraced the rationale underlying the rule applied by the district court, albeit in dicta and over a century ago. Interpreting a tolling statute that did not explicitly provide for an exception when the defendant was amenable to service of process, the Court stated: "It seems that the absence of the defendant, contemplated in this section of the statute, must be such as would prevent the plaintiff, during its continuance, from enforcing his cause of action by a judgment *in personam*, against the defendant." *Niblack v. Goodman,* 67 Ind. 174, 1879 WL 5577, at *12 (Ind. 1879). Its reasoning applies with no less force today.

RSC distinguishes its case from *Haton* by noting that IPSOS was not just outside the state of Indiana, it was outside the United

States. The rule in *Haton* should not apply here, RSC argues, because of the added burden involved in serving parties in foreign countries. But Indiana law makes no distinction between defendants based in the United States and those based in foreign countries. The manner of service is the same: by simple certified mail, *see* Ind. Code § 23-1-49-10; Ind. R. Trial P. 4.1(A)(1), 4.4(B)(1), 4.6(B), a method permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163. France has not objected. *See id.*, Article 21 & n.7.[3] That IPSOS could be served only in France does not render it unamenable to service, and the tolling statute should not apply. *See Alday,* 10 F. Supp. 2d at 565 (when defendant was amenable to service of process under the Hague Convention, tolling provision did not apply). The district court's application of the *Haton* rule in this case is consistent with Indiana law, and RSC has not pointed us to persuasive indications showing that the Supreme Court of Indiana would decide the issue differently. Therefore, the district court did not err in granting summary judgment for IPSOS.

**Conclusion**

The judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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[3] The Hague Convention is appended to Federal Rule of Civil Procedure 4. *See* Fed. R. Civ.P. 4, conventions.

## APPENDIX P

# United States Court of Appeals

***For the Seventh Circuit***
***Chicago, Illinois 60604***

March 28, 2002

***Before***

**Hon. RICHARD A. POSNER, Circuit Judge**

**Hon. KENNETH F. RIPPLE, Circuit Judge**

**Hon. TERENCE T. EVANS, Circuit Judge**

Nos. 00-3742 and 00-4073

RESEARCH SYSTEMS CORPORATION,
Plaintiff-Appellant,

v.

IPSOS PUBLICITE, IPSOS USA, IPSOS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 97 C 10

**Richard L. Young,** *Judge.*

**ORDER**

On consideration of the Plaintiff-Appellant's petition for rehearing filed on January 22, 2002, the judges on the panel have voted to deny the petition. Accordingly,

It is ORDERED that the petition for rehearing is DENIED.

## APPENDIX Q

# United States Court of Appeals

***For the Seventh Circuit***
***Chicago, Illinois 60604***

March 28, 2002

***Before***

**Hon. RICHARD A. POSNER, Circuit Judge**

**Hon. KENNETH F. RIPPLE, Circuit Judge**

**Hon. TERENCE T. EVANS, Circuit Judge**

Nos. 00-3742 and 00-4073

RESEARCH SYSTEMS CORPORATION,
Plaintiff-Appellant,

v.

IPSOS PUBLICITE, IPSOS USA, IPSOS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division.

No. 97 C 10

**Richard L. Young,** *Judge.*

**ORDER**

The opinion of this court issued on January 9, 2002, is amended as follows: At slip opinion page 3, last line, delete the words: "on which the parties agreed".

At slip opinion page 5, the first full paragraph, line 14, delete: "RSC and IPSOS agreed to the schedule, and". Begin the sentence with "The". Also, line 17, delete the word "that" and add "the". After the word "schedule" add:

> ordered by the court after conference with counsel and with the opportunity to make any corrections or additions.

The sentence should read:

> The discovery materials that RSC complains of receiving only in the month before the trial were delivered timely according to the schedule ordered by the court after a conference with counsel and with the opportunity to make any corrections or additions.

At slip opinion page 5, line 19, delete the words: agreed-upon.

The sentence should read:

> Nowhere in its brief does RSC claim that any discovery materials were produced late according to the schedule.